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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Joseph C. Spero, Magistrate Judge

DAVID AND NATASHA WIT, et al., )

Plaintiffs, )

VS. )

**NO. C 14-02346 JCS**

UNITEDHEALTHCARE INSURANCE )  
COMPANY, et al., )

Defendants. )

GARY ALEXANDER, on his own )  
behalf and on behalf of his )  
beneficiary son, Jordan )  
Alexander, and all others )  
similarly situated; et al., )

Plaintiffs, )

VS. )

**NO. C 14-05337 JCS**

UNITED BEHAVIORAL HEALTH )  
(operating as OptumHealth )  
Behavioral Solutions), )

Defendant. )

San Francisco, California  
Wednesday, September 2, 2020

**TRANSCRIPT OF PROCEEDINGS BY ZOOM WEBINAR**

**(APPEARANCES CONTINUED ON NEXT PAGE)**

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Wednesday - September 2, 2020

9:30 a.m.

P R O C E E D I N G S

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**THE CLERK:** Okay. So court is in session with The Honorable Joseph C. Spero presiding.

I do have one housekeeping announcement I do need to make, and that's just to let you know that persons granted remote access to court proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings, including those held by telephone or videoconference. See General Order 58 at paragraph 3:

"Any recording of a court proceeding held by video or teleconference, including," quote/unquote, "screen shots or other visual copying of a hearing, is absolutely prohibited. Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future hearings, or any other sanctions deemed necessary by the court."

Today our court reporter is Jo Ann Bryce.

And we are calling Case Number 14-cv-2346, Wit vs. UnitedHealthcare Insurance Company, and the related case 14-cv-5337, Alexander, et al., versus United Behavioral Health.

We'll take appearances first from plaintiff and then from the defendant.

1           **MS. REYNOLDS:** Thank you.

2           Good morning, Your Honor. This is Caroline Reynolds from  
3           Zuckerman Spaeder on behalf of the plaintiffs, and appearing  
4           with me today are my partners Adam Abelson and Jason Cowart.  
5           And I also wanted to let the Court know that also in appearance  
6           today among the participants, although not speaking, are Brian  
7           Hufford, Carl Kravitz, and our co-counsel Meiram Bendat.

8           **THE COURT:** All right. Good morning.

9           **MS. REYNOLDS:** Good morning.

10          **MS. ROMANO:** Good morning, Your Honor. Jennifer  
11          Romano for defendant United Behavioral Health, and with me  
12          appearing today is my partner April Ross.

13          **THE COURT:** Good morning, everyone. Thank you.

14          And I just wanted to give you a little bit of a timetable  
15          for the day. So we're going to start and we're going to go --  
16          I have criminal duties to attend to at various points during  
17          the day so I'm going to drop off and come back on. The first  
18          of those drop-offs will be at 10:30. The second one will be at  
19          about 12:00 or 12:15, I don't know exactly when; but for  
20          10:30 I'm going to drop off and do criminal matters and I'll  
21          leave the meeting. I hope to come back into the meeting in  
22          about a half an hour, but if you'll bear with me, it sometimes  
23          takes longer than that.

24          What I want to do today is address first issues related to  
25          class certification, class list, and noticed issues; and then

1 after those issues are done, talk about remedies issues.

2 So, everyone, any thoughts or comments about that schedule  
3 or the drop-offs or anything?

4 **MS. REYNOLDS:** No, Your Honor. Thank you.

5 **THE COURT:** Okay. So on class certification, I have a  
6 number of issues, but the first group issues has to do with  
7 whether or not it was right to certify all of the things we are  
8 doing in the remedy phase under all three sections of  
9 Rule 23(b).

10 You know, having reread *Dukes* and the cases that followed  
11 it, I'm a little concerned that we should reanalyze some parts  
12 of the certification based on the remedies that are requested,  
13 and my thinking is that dec. relief and injunctive relief as  
14 requested are mandatory and divisible, that probably are (b)(2)  
15 remedies, although I could be convinced that they might also  
16 fall under (b)(1), and those kind of things don't require any  
17 notice or opt-out, et cetera, et cetera; but the reprocessing  
18 and then what we originally had and don't have anymore, the  
19 surcharge remedies are not quite so easily put into that  
20 bucket. You know, I understand the argument on why it might  
21 be, but I'm concerned that someone might second-guess that down  
22 the line, which would be quite unfortunate.

23 And since it grants relief to specified individuals and  
24 that relief, as applied to those individuals, is quite  
25 individual, even if it can be described in a generic fashion,

1 it should be analyzed under (b)(3), including the right to  
2 notice and opt out, which of course we gave everyone.

3 So that's my tentative thought, and I have a series of  
4 questions and I'll just go through those questions, and then  
5 I'll hear from everybody on these series of issues.

6 The first question is: On dec. relief, it strikes me that  
7 all of the dec. relief is mandatory, but the only agreement I  
8 could discern from the, you know, mandatory and not -- and  
9 general, not individual, the only agreement that I could get  
10 from the briefs is that forward-looking dec. relief was  
11 appropriate.

12 So I wanted to get everyone's thoughts on whether or not  
13 dec. relief, even if it's looking backwards, in other words,  
14 you know, we know what that's going to say, UBH violated plans  
15 by applying the -- by having these guidelines, is that a  
16 mandatory remedy? And if so, should it be considered under  
17 (b)(1) or (b)(2)?

18 You know, if it's not mandatory, then do I need to specify  
19 in the remedy or the certification order what part is not  
20 mandatory and link it to another subsection of 23(b)? And then  
21 do I need to allow opt-outs any more than I already have?

22 If I decide that dec. relief and injunctive or both under  
23 (b)(1) or (b)(2) -- and I'm really interested in your thoughts  
24 about which one -- and (b)(3) is applicable to reprocessing,  
25 how do I implement that?

1       Is there a reason why I should do an amendment to the  
2       class certification order? You know, sort of decertify the  
3       reprocessing remedy with respect to (b)(1) and (b)(2), keep it  
4       certified as to (b)(3), decertify the dec. relief and  
5       injunctive as to (b)(3) but keep it as to (b)(1) and (b)(2); or  
6       can I just say in the remedies order what subsection applies to  
7       which one?

8       Are there any important distinctions? The only  
9       distinctions I could think about have to do with the way  
10      *res judicata* works down the road, and so I'm interested in  
11      whether or not there's some issue on that that I need to pay  
12      attention to so that it might be more important to put it in a  
13      decertification kind of order rather than a -- I mean, for the  
14      actual what's happening in this case, what happens to the class  
15      in this case, none of this seems to make any difference, but  
16      I'm concerned about spin-off effects down the road in other  
17      cases and whether or not I got it right so the Court of Appeals  
18      will think I got it right.

19      If I decide to do what I'm talking about and make --  
20      decertify and make it clear that the declaratory relief and the  
21      injunctive relief remedies are mandatory, can I -- what do I do  
22      about opt-outs? Can I make it clear that no one gets to opt  
23      out of those remedies now, even though I allowed opt-outs  
24      before, and give notice to those folks, 139 of them or whatever  
25      they are, you know, "I'm sorry, yes, you got to opt out out of

1 the reprocessing remedy but actually as to the others I've  
2 reconsidered and it's a mandatory class"?

3 And then does any of that matter? I mean, what's the  
4 impact of even saying that to anyone? You know, so I -- if I'm  
5 just declaring that UBH violated the law in these following  
6 ways and is enjoined to use the following standards for the  
7 future, I'm not sure what the impact is on these people who  
8 opted out of making this distinction other than the possible, I  
9 think somewhat unforeseeable, questions about *res judicata* and  
10 that the *res judicata* impact of the (b)(1) and (b)(2) classes  
11 are dramatically less than the *res judicata* with respect to  
12 (b)(3) class judgments.

13 You know, my instinct is that none of them would keep  
14 opt-outs from litigating whether or not their claims were  
15 wrongfully denied even if I kept them in on the (b)(1) and  
16 (b)(2) classes, but I'd like to hear your thoughts on that.

17 Lastly, what is the impact on the class list of linking  
18 certain subsections of 23(b) to certain remedies? Do we  
19 have -- I guess we have -- my instinct is we have very similar  
20 remedies, the same class list for all of them for the two  
21 groups except that the opt-outs for reprocessing wouldn't be  
22 included in the opt-outs. Or maybe there's other differences  
23 that you might be able to think about because you've thought  
24 about this more than I have.

25 So that's my thought. My tentative thought is to divide



1 it up in terms of certification.

2 Okay. So let me hear, just for no particular reason, from  
3 the plaintiff and then the defendant.

4 **MS. REYNOLDS:** Thank you, Your Honor.

5 And I'll start and then with respect to the questions  
6 about *res judicata*, my colleague Mr. Abelson will speak to  
7 those specific issues.

8 So, Your Honor, the plaintiffs believe that it would be a  
9 mistake to at this point in the case begin decertifying the  
10 class in relation to specific remedies; and, you know, we set  
11 this out in our supplemental briefing, but the place I'd really  
12 like to start is with Rule 23(b)(3).

13 And a class that is certified under Rule 23(b)(3) is  
14 unquestionably able to obtain from the court injunctive relief,  
15 forward-looking injunctive relief, declaratory relief, and  
16 reprocessing. So there are no remedies that the plaintiffs are  
17 asking for in this case that would be unavailable to a (b)(3)  
18 class. So decertifying the (b)(3) class for portions of that  
19 relief doesn't make any sense. We think it would be confusing.  
20 It would be unfair to the people who have opted out, and --

21 **THE COURT:** How is it unfair?

22 **MS. REYNOLDS:** -- it would be wrong.

23 **THE COURT:** How is it unfair?

24 **MS. REYNOLDS:** Well, we sent them a notice that was  
25 approved by the Court that told them that they would not be

1 bound by the remedies in this case and that they could opt out  
2 in full.

3 Now, we don't know what they did in reliance on that  
4 notice. We have not seen any evidence that people filed their  
5 own lawsuits, but we really don't know whether they did or  
6 didn't, but they took whatever action they were going to take  
7 in reliance on a notice that very clearly told them they could  
8 opt out. That will --

9 **THE COURT:** Well, that's a different question from the  
10 one you were just talking about, though. That's the question  
11 of whether or not if I'm just going to certify the dec. relief  
12 and injunctive relief under (b)(1) and (b)(2) and not under  
13 (b)(3), I can make it a mandatory class. I mean, that's a  
14 separate question from the issue of is it fair to them that  
15 they're certified under one section or another, I think.

16 **MS. REYNOLDS:** I understand what you're saying,  
17 Your Honor. I think the point I was trying to make is that if  
18 the Court says that the classes are decertified for purposes of  
19 certain relief, then they would necessarily be -- I assume that  
20 the reason would be that the Court would not be allowing those  
21 opt-outs to be honored. So --

22 **THE COURT:** And what's the implication of not allowing  
23 those opt-outs to be honored? I mean, it's hard to imagine any  
24 implication for these people. I understand the sort of  
25 confusion issue. I'm not -- I'm not terribly -- I mean, we can

1 probably make that -- it's only 139 people. It's a very  
2 limited group. We can figure out what to say to them, but my  
3 question is: What actually happens to them that's bad?

4 **MS. REYNOLDS:** Well, I mean, if you -- this requires a  
5 couple of assumptions, and I think some of them I can get to  
6 when I talk about (b)(1) and (b)(2) and Mr. Abelson will  
7 address them with respect to *res judicata*. But, you know, if  
8 you tell them that their claims are mandatory, perhaps it will  
9 have some impact on their ability to bring a case in the  
10 future.

11 I don't -- I think this is -- I do want to say,  
12 Your Honor, you made this point and I think it's absolutely  
13 right, we're talking about 139 people out of 163,000-plus  
14 notices that went out. So this is a little bit -- I don't want  
15 to let the tail wag the dog. This is a very, very small group  
16 of people, and I want to stay focused on the class that has  
17 been certified, and I think it would be wrong to suggest that  
18 this class that has been certified under (b)(3) is somehow not  
19 entitled to some or portions of the remedies that have been  
20 requested.

21 And if the --

22 **THE COURT:** What if it wasn't just certified under  
23 (b)(3), that the way we did it is all of the remedies were  
24 certified under all of the subsections? You don't think  
25 there's a risk that a judge looking at it three years from now

1 in the Court of Appeals is going to say, "Well, that's clearly  
2 wrong and we have to reverse the whole thing because you can't  
3 get one of those remedies at least under (b)(1) and (b)(2)?  
4 Even though you certified everything under all three, that  
5 that's not what *Dukes* permits. *Dukes* permits -- *Dukes* says you  
6 cannot do it under this subsection or that subsection, and you  
7 have to do it all over again.

8 **MS. REYNOLDS:** With respect, Your Honor, I think that  
9 outcome seems remote. The Court made findings that the class  
10 met the requirements of certification under all three sections.  
11 If the Court of Appeals at some point thinks that it was  
12 incorrect to certify the injunctive class under (b)(3), the  
13 remedy for that isn't to go back and decertify the (b)(2)  
14 class. It's just to decertify the (b)(3) portion.

15 So it seems to me that if this is a class that  
16 unquestionably meets every possible way of being certified  
17 under Rule 23 and the class is entitled to the relief, I think  
18 trying to slice it and dice it in such a way actually risks  
19 creating error where there actually isn't any to begin with.

20 **THE COURT:** I mean, my concern would be different than  
21 the one that you're concerned about. My concern would be that  
22 they would say it is obvious that the reprocessing claim can't  
23 be certified under (b)(1) and (b)(2), and that they will say  
24 "Since the judge did not make any distinction between the  
25 three, he made findings under (b)(3) but he also certified it

1 under (b) (1) and (b) (2), we need that" -- I mean, you know,  
2 it's sort of -- it's a wonderful little lawyer's argument about  
3 things on the head of a pin until we get to *res judicata*; but  
4 because of the implications for *res judicata*, or whatever else  
5 they can think of, isn't there some risk that they say that was  
6 clearly wrong?

7 **MS. REYNOLDS:** But, again, I think if the Court finds  
8 that the (b) (1) and (b) (2) portions of the Court's class  
9 certification order were wrong, I don't see why that would lead  
10 them to then reverse the (b) (3) findings.

11 And the Court made separate findings as to the class, that  
12 they were -- that the class met the requirements under each of  
13 the rules separately; and so if a portion turns out ultimately  
14 to have been wrong, I don't see why that would lead to reversal  
15 of the portion that was correct.

16 And I think, you know, in the Court's order certainly the  
17 Court could make clear that the Court finds that this remedy is  
18 available to a class certified under this rule and this rule  
19 and this rule and, you know, make clear what the Court is  
20 finding about what is available to the class members. But I  
21 don't see why even if that's ultimately wrong, say the court  
22 says, "Well, I think declaratory judgment relief is available  
23 to any of these three types of classes," if the court  
24 ultimately finds that -- the Circuit finds that to be  
25 incorrect, I would think they would reverse only the portion

1 that is incorrect and not the entire decision.

2 **THE COURT:** One would hope.

3 **MS. REYNOLDS:** There doesn't seem to be a basis for  
4 reversing a decision that was correct and was supported by  
5 findings and set forth in the Court's orders just because there  
6 was a mistake on a different issue.

7 And, Your Honor, before turning it over to Mr. Abelson to  
8 address *res judicata*, I just wanted to make the point that if  
9 the Court agrees with me that all of these forms of relief  
10 could be granted to a (b)(3) class, then the mere fact that an  
11 opt-out was permitted in this class in this case shouldn't  
12 drive a decision that those forms of relief can't be awarded to  
13 a (b)(1) or (b)(2) class because, you know, opt-outs are  
14 mandatory for (b)(3) classes.

15 So if a (b)(3) class could get an injunction and people  
16 would have to be allowed to opt-out of that injunction under  
17 (b)(3), then it stands to reason that allowing opt-outs isn't  
18 prohibited when an injunction is provided under one of the  
19 other two parts of Rule 23(b).

20 So I think Your Honor, I'm sure, will let me know if I  
21 missed anything, but right now I think I'd like to turn it to  
22 Mr. Abelson to address your questions about *res judicata*.

23 **THE COURT:** Okay.

24 **MR. ABELSON:** Good morning, Your Honor.

25 So to address those questions, so one aspect of

1 Your Honor's questions, as I understood them, was the question  
2 of whether making distinctions here and certifying under  
3 certain remedies -- tying certain remedies to certain  
4 subsections of Rule 23 will have any differing effects with  
5 respect to *res judicata*; and if so, should that inform the  
6 analysis, at the risk of rephrasing or expressing how I  
7 understood what the question is to be on the table.

8 So a couple of points. First, I do think this is purely  
9 hypothetical so, as the Court put it, it is somewhat  
10 unforeseeable to know whether these issues would arise in  
11 subsequent cases or pending cases.

12 **THE COURT:** Well, it's not hypothetical. People have  
13 filed lawsuits. The judges have forestalled the decision on  
14 the *res judicata* effect, but they will, they will address it,  
15 and I guarantee UBH will raise it. And so the question for my  
16 mind is -- so I still think it's -- I think this one is -- this  
17 is the core of the question about how I address the  
18 distinctions between (b)(1) and (b)(2) and (b)(3).

19 **MR. ABELSON:** Right. And I've looked at those cases,  
20 it's a subset of the 15 on UBH's list, and some courts have  
21 stayed those actions pending a remedies decision or judgment in  
22 this case and, I agree, have punted for now on the question of  
23 what the *res judicata* effect is.

24 But our position has been and remains the same, that once  
25 those courts reach -- that small number of courts reach this

1 question, the conclusion will be -- the preclusive effect is  
2 what we've said it is, which is only as to the claims that have  
3 been certified in this case. Those are the claims that were  
4 brought and could have been brought in the course of this class  
5 action.

6 And it is possible that an argument could be made that in  
7 that subset of cases that there's a distinction with respect to  
8 preclusion as to the different sections; but, frankly, I do  
9 think that is hypothetical, that --

10 **THE COURT:** Well, bear with me because none of us are  
11 going to know. So let's assume it's an actual problem. What  
12 is the -- what about that distinction? Is there a distinction  
13 for *res judicata* effect if I certify or state in the remedies,  
14 if that's the right way I should do it -- or maybe there's a  
15 difference between the two -- that these remedies are under  
16 this section and these remedies are under that section?

17 **MR. ABELSON:** There are cases where I'm aware that  
18 that distinction has been made. I've looked at the  
19 complaint -- we've looked at the complaints filed in those  
20 cases. The claims are different, and so I guess that's why I  
21 think once the courts actually get to reaching the question,  
22 they're not going to get to these distinctions because off the  
23 bat these are different claims.

24 **THE COURT:** Okay.

25 **MR. ABELSON:** To the extent they overlap, the courts



1 can read the district court's opinion and look at the  
2 prevailing law and whatever that jurisdiction is on the  
3 *res judicata* standard.

4 **THE COURT:** Well, okay. Yes, they could if you win.  
5 If they disagree with you, what is the difference in the  
6 *res judicata* effect of doing it the way that you want me to do  
7 as to the way that I've suggested?

8 So I'm not really asking about the "if you win" question.  
9 Isn't there a better argument that, for example, people are  
10 barred from bringing their own claims if they don't opt out for  
11 wrongful denial of benefits on whatever grounds, grounds other  
12 than the grounds that were raised here, if it's a (b)(3) class  
13 rather than a (b)(1) or (b)(2) class?

14 Isn't that a better argument under the -- I mean, I think  
15 it's a wrong-headed argument too but it's going to be raised.  
16 It's already been raised. Why would I -- and I clearly have  
17 not adjudicated those other things. So is there a way to  
18 protect against that, make it clear what I'm doing at least so  
19 that the courts that follow can -- and I don't know if "protect  
20 against" is the wrong word, but make it clear what I'm doing so  
21 that they will understand the *res judicata* effect as flowing  
22 from the particular subsections of (b)(1) and (b)(2)?

23 **MR. ABELSON:** So, first of all, I think the Court has  
24 already done what is appropriate to do to constrain the  
25 preclusive effect of its judgments by certifying the claims

1 that it certified because that's, you know, the authority that  
2 we've cited before. Although you can't prejudge this question,  
3 the way to constrain the preclusive effects, to the extent the  
4 Court can, is by defining the class claims to align with what  
5 the class claims are.

6 I guess that's -- and there are -- I'm aware of the cases  
7 that suggest that the preclusive effect of a (b) (1) -- of a  
8 judgment where there was not an opt-out may have less  
9 preclusive effect, but I just don't think those distinctions  
10 will matter here. And, in any event, it's those courts that  
11 will be much better positioned to opine on what those  
12 distinctions may be in, again, the very small number of cases  
13 that this even could come up in.

14 And then I guess the other question related to  
15 *res judicata* -- not *res judicata*, the class list that I  
16 understood the Court to raise was the impact on the class list  
17 of linking remedies to particular subsections of the rule.

18 First of all, as the Court knows, it's the class  
19 definition that controls who is or is not in the class, not  
20 necessarily the list itself. The parties obviously have taken  
21 good faith efforts to come up with a good list. So I guess  
22 that's one point.

23 And my other point would be, we do think it's a reliable  
24 list. There are some issues on the margins that were the  
25 subject of the supplemental briefing, but I don't think any of

1 that should be affected by this distinction.

2 **THE COURT:** Well, okay. So, you know, that doesn't  
3 answer my questions. Neither of those things answer my  
4 questions. I mean, I must say they really don't.

5 So let's assume you're wrong about I've already done what  
6 I need to do to define what this case is about for purposes of  
7 *res judicata*. Let's just pretend that that doesn't work.

8 Okay. Pretend that doesn't work. Is there any -- what happens  
9 in terms of *res judicata* effect, number one, if I do what I  
10 suggested, either in a decertification order or in a remedies  
11 order? And is there any meaningful distinction? That's  
12 question one.

13 Question two is: What does the class list look like if I  
14 do that? The class list because we're fighting about the class  
15 list. Are there any -- do we have two class lists then? Are  
16 they different? And presumably they're different or not. So  
17 that's the second question.

18 But the first question is -- you know, and I understand.  
19 I don't want -- I understand your argument about *res judicata*,  
20 and maybe in the end I'm comfortable with it. If I'm not, and  
21 it may be a combination of I'm not comfortable with it because  
22 I can't -- I don't want to -- I want to make things clear for  
23 other courts or I want to do this for reasons related to *Dukes*,  
24 not related to *res judicata*, but bear with me and answer the  
25 question the way I put it. Thanks.

1           **MR. ABELSON:** Sure. So I don't -- in terms of  
2     constraining -- taking further steps, I suppose, to further  
3     constrain or make clear what the preclusive effect is, sure,  
4     there's nothing precluding the Court, no good reason not to  
5     articulate what I think we're both articulating, which is that  
6     the preclusive effect, regardless of the section that this is  
7     certified under, is limited to if a plaintiff in such other  
8     case were to challenge a denial on the same grounds that we  
9     have challenged the denials in this case. That would be  
10    helpful to such other court.

11           **THE COURT:** Well, is it helpful to say I'm certifying  
12    this remedy under (b) (1) and (b) (2) and this other remedy under  
13    (b) (3)?

14           **MR. ABELSON:** I don't think so. I don't think that  
15    would be necessary or provide any meaningful distinction.

16           **THE COURT:** Okay.

17           **MR. ABELSON:** And then as to the class list, currently  
18    what we've referred to as the class list I believe does not  
19    include the opt-outs. So I suppose if the Court were to go the  
20    route of drawing a distinction and want lists that correspond  
21    to both, I suppose those could be added back in. We know who  
22    those people are.

23           I don't know if that answers the Court's question.

24           **THE COURT:** Okay. I think it does.

25           **MS. REYNOLDS:** And, Your Honor, if I may just --

1           **THE COURT:** Yes.

2           **MS. REYNOLDS:** -- make one additional point on the  
3 class list issue.

4           The presence or absence of the opt-outs is really the only  
5 difference that this slicing and dicing would have on the class  
6 list. So meaning that the classes for all of the remedies,  
7 whether it's under (b)(1), (b)(2), or (b)(3), they're all the  
8 same. The classes are identical and had this -- you know, as  
9 the Court previously found, had all the same claims and the  
10 same harm and common issues, and so forth, and so that's why  
11 they look exactly the same. And the only question is whether  
12 the Court is going to deem the 139 opt-outs as ineffective.  
13 And if it does so, as Mr. Abelson said, it's a very simple  
14 matter of just putting those names back on the list.

15           **THE COURT:** Okay.

16           **MS. REYNOLDS:** But, again, I think they'd have to be  
17 put on -- I guess they'd be put on just the (b)(1) and (b)(2)  
18 lists.

19           **THE COURT:** Right. No, of course, and in your view,  
20 is there any practical distinction for those folks of being or  
21 not being part of those mandatory classes?

22           **MS. REYNOLDS:** I really don't think so, Your Honor.  
23 The point that we made in our briefing is that, you know, with  
24 respect to injunctive relief, the result on nonparties to this  
25 case results from the way UBH operates its business. It

1 doesn't have, you know, many, many, many sets of criteria. It  
2 has one, and so people who aren't part of this case are going  
3 to be subjected to those criteria the same as the class  
4 members; and that, in our view, doesn't undermine the  
5 appropriateness of that relief under (b)(1) and (b)(2). It  
6 doesn't make it less mandatory for the class.

7 **THE COURT:** Okay.

8 All right. Let me hear from Ms. Romano.

9 **MS. ROMANO:** Yes. Thank you, Your Honor. Can you  
10 hear me okay?

11 **THE COURT:** Yes, I can.

12 **MS. ROMANO:** Okay. Great.

13 What the Court is suggesting it's inclined to do is  
14 largely aligned with many of the arguments made by United  
15 Behavioral Health in the supplemental briefing. I will start  
16 by saying that UBH has also brought a motion for  
17 decertification on the ground of failure of class-wide proof  
18 with respect to (b)(1), (b)(2), or (b)(3) class certification.

19 But assuming that the Court is not going to be  
20 decertifying the classes in their entirety, to address  
21 Your Honor's question with respect to whether there should be  
22 some additional order or ruling tying these specific remedies  
23 to (b)(1), (b)(2), or (b)(3), yes, UBH agrees that that is  
24 appropriate and, in fact, that it is compelled by Rule 23 such  
25 that the declaratory relief and prospective injunctive relief

1 should be tied to (b) (1) or (b) (2) and such that the  
2 reprocessing relief, if it is ordered, should be tied to a  
3 (b) (3) class.

4 With respect to the right method to do that --

5 **THE COURT:** Right.

6 **MS. ROMANO:** -- we would suggest that it is through a  
7 decertification or amendment to the class certification order.  
8 For clarification purposes so that it is particularly clear for  
9 future courts or the Ninth Circuit, that would be the  
10 appropriate and most clear way to address these issues.

11 **THE COURT:** So why is that? Ms. Reynolds suggests  
12 that I just put in whatever I want to, and she didn't have an  
13 objection to my putting in the remedies order that we are  
14 limiting -- we're giving the reprocessing remedy pursuant to  
15 (b) (3) and the other two remedies pursuant to (b) (1) and  
16 (b) (2) .

17 **MS. ROMANO:** Your Honor, how that was worded, it may  
18 be effective for these purposes as well; but the point here is  
19 that it is not just that, the remedies are being issued  
20 pursuant to (b) (1) or (b) (2) or (b) (3). The point is that the  
21 Court, I would assume here, would be holding and ruling that  
22 the class is only certifiable with respect to declaratory  
23 relief or prospective injunctive relief under (b) (1) or (b) (2)  
24 and only certifiable under (b) (3) with respect to reprocessing.

25 So a clarification just with respect to remedies would not

1 address that fully. It would be done through the full class  
2 certification order and decertification of what is currently in  
3 place.

4 **THE COURT:** And why do I need to do that rather than  
5 just say I'm -- why do I need to do that?

6 **MS. ROMANO:** Because plaintiffs have not proven  
7 entitlement to Rule 23 certification with respect to  
8 declaratory relief or prospective injunctive relief under the  
9 (b)(3), and they have not satisfied the requirements for class  
10 certification for the other two remedies under reprocessing  
11 under (b)(1) and (b)(2). So it goes more to the remedies. It  
12 goes to whether the criteria for Rule 23 were met in the first  
13 place.

14 **THE COURT:** Well, I'm not sure that's all right, but  
15 it is -- the genesis of my question is the latter, is the issue  
16 about whether or not the reprocessing remedy was properly  
17 certified under (b)(1) and (b)(2). And, you know, I guess the  
18 distinction is what Ms. Reynolds says is, "Well, assuming  
19 you're wrong, it's still certified under (b)(3) so it really  
20 doesn't matter."

21 **MS. ROMANO:** Well, it does matter, Your Honor, because  
22 what they are seeking -- the type of relief they're seeking for  
23 declaratory relief and prospective injunctive relief is  
24 incompatible with opting out. It's incompatible with what  
25 (b)(3) provides for. It is relief that would be subject to



1 certification under (b)(1) and (b)(2), and it should -- the  
2 order -- the class certification order should reflect that.

3 **THE COURT:** But why does it matter? I mean, what's  
4 the practical -- what's the legal distinction? What happens?  
5 I'm just thinking down the road I'm trying to figure out  
6 whether there's anything that actually happens either because  
7 we might be subject to reversal in a way that matters, not just  
8 they're going to say "You shouldn't have certified under (b)(1)  
9 and (b)(2) but, okay, you did it under (b)(3) so we'll leave it  
10 alone," in a way that matters, or in some practical  
11 distinction.

12 **MS. ROMANO:** The most clear way it matters is with  
13 respect to the opt-outs and whether there is an ability under  
14 Rule 23 to opt out at all, and the mandatory remedies of the  
15 prospective injunctive relief and declaratory relief are not  
16 subject to an opt-out and, therefore, it matters that it's  
17 under (b)(1) or (b)(2).

18 Of course the reprocessing is an individualized relief and  
19 it is not relief that would be available under (b)(1) or  
20 (b)(2). It is subject to the notice in the opt-out, which did  
21 happen and, therefore, that is why it matters.

22 **THE COURT:** Well, but what is that? So why does it  
23 matter then? Why does that matter?

24 So, for example, I allowed someone to opt out of the dec.  
25 relief and the injunction. I've done that. Who cares? I'm

1 still going to issue the injunction. The injunction will say  
2 "UBH, thou shalt do this." It's not going to be identified for  
3 particulars.

4 I'm still going to issue the dec. relief. The dec. relief  
5 is still going to be generic. You know, you applied, you  
6 created guidelines that are inconsistent with the terms of UBH  
7 plans that have a medical necessity component. I mean, I  
8 wonder what the distinction is in fact for the folks who opted  
9 out of opting out of dec. relief and injunctive relief. Is  
10 there any distinction? Is there anything that is different  
11 with respect to them because they got to opt out of that?

12 They opt out of the reprocessing remedy, they don't get  
13 reprocessed; but the other one, (b)(1) and (b)(2), I don't  
14 understand what actually happens to them that's different.

15 **MS. ROMANO:** Well, I mean, it does get to the  
16 preclusive effect in subsequent cases, and we can't predict  
17 what will happen in the existing individual cases or future  
18 cases that could be filed; but individuals who met the  
19 definition of the class should not be able to sue to seek  
20 relief that would be inconsistent with the declaratory relief  
21 or prospective injunctive relief that the Court may order.

22 **THE COURT:** Okay.

23 **MS. ROMANO:** Under (b)(1) and (b)(2), they should not  
24 be able to opt out of a relief under *Dukes*; and Rule 23(b), the  
25 point of it is to sort out who is in the class -- to determine

1 who is in the class, and so it is important to know and to  
2 identify who is in the (b) (1)/(b) (2) class, that would include  
3 everybody, you can't opt out from it, and who is in the (b) (3)  
4 class, who would be entitled to reprocessing.

5 **THE COURT:** Okay. Let me write this down. Hang on a  
6 second.

7 (Pause in proceedings.)

8 **THE COURT:** So your point is they shouldn't be able to  
9 seek relief that is inconsistent with what I order in those  
10 what should be, in your view, mandatory classes?

11 **MS. ROMANO:** Yes.

12 **THE COURT:** And, I mean, it's another question, and I  
13 guess I want to kick it back to Ms. Reynolds or Mr. Abelson  
14 after you respond to it, and that is, aren't I still allowed to  
15 allow opt-outs in (b) (1) and (b) (2) classes? Aren't I still  
16 allowed to?

17 **MS. ROMANO:** No.

18 **THE COURT:** No. I mean, there's no case that says I  
19 can't ever do it. There are cases that say you can. I'm just  
20 wondering why you think I can't anymore.

21 **MS. ROMANO:** Your Honor, plaintiffs didn't cite to any  
22 cases saying that you can; and, in fact, there are many cases  
23 that specifically cite to Rule 23(b) and (b) (1) and (b) (2) and  
24 say that those are mandatory classes.

25 **THE COURT:** Well, but there have been cases over the

1 years that have allowed opt-outs in those circumstances and  
2 there are many of them. I'm just wondering why I can't do it  
3 now. I mean, and this is an argument about what *Dukes* means as  
4 far as I'm concerned.

5 **MS. ROMANO:** It is, Your Honor, and it's defendants'  
6 position that under *Dukes*, the (b)(1) and (b)(2) classes are  
7 mandatory classes. The relief associated with them is  
8 incompatible with opt-outs and they are mandatory classes.

9 **THE COURT:** If you don't mind, I want to kick it back  
10 to Ms. Reynolds for a second and then I'll come back to you on  
11 that issue.

12 This is about whether or not there's any viability to what  
13 I used in the opt-outs for (b)(1) and (b)(2)s. The cases in  
14 which there were (b)(1) and (b)(2) opt-outs allowed were cases  
15 in which it appeared to me, at least from the description and  
16 the literature, would no longer be permitted under *Dukes*; that  
17 is to say, they actually involved individualized payments of  
18 back pay or things like that. I'm wondering whether or not  
19 there's any viability at all after *Dukes* to an opt-out; and if  
20 there is, why this is the case that it would happen.

21 So, for example, in the prior cases that allowed opt-outs  
22 under (b)(1) and (b)(2), the distinction was, "Well, there are  
23 some individualized issues here with regards to back pay so  
24 we're going to give these people what they would otherwise have  
25 if it were certified under another subsection. We're going to

1 give them a right to opt out."

2 My reason given in my original certification order for  
3 allowing opt-outs was a little thinner than that. It was,  
4 well, it's administratively inconvenient to draw that  
5 distinction, or it would be confusing to the class if I drew  
6 that distinction. I'm not sure that passes muster anymore now  
7 that I've thought about the way *Dukes* limited the playing field  
8 or even under the original test. I'm a little concerned that  
9 my -- is that allowing opt-outs on that basis wouldn't pass  
10 muster, and so that's my question for you.

11 So you're muted, Ms. Reynolds.

12 **MS. REYNOLDS:** Sorry. Thank you, Your Honor.

13 *Dukes* was not addressing the question that the Court asks.  
14 So *Dukes* was really addressing the issue of whether or not  
15 plaintiffs can shoehorn individual relief into a case under  
16 (b) (1) and (b) (2).

17 This is really the opposite case -- right? -- where we  
18 have certification under all three that's appropriate, and the  
19 question is: Allowing some folks to opt out of the case, does  
20 that somehow undermine the purposes of (b) (1) and (b) (2) or  
21 undermine the appropriateness of certifying under those? And  
22 there's nothing in *Dukes* that holds that that would be the  
23 case.

24 So the prior cases, the pre-*Dukes* cases in which courts  
25 allowed opt-outs, again, I think it was getting to this issue

1 about if there's a monetary award at issue, then plaintiffs  
2 have to be given due process rights to opt out and that's why  
3 they get shunted to (b) (3), which has a mandatory opt-out  
4 right. But there's nothing in *Dukes* or any case law or the  
5 rule itself that says that the Court does not have the  
6 discretion in an appropriate case to permit (b) (1) and (b) (2)  
7 class members to opt out.

8 And I would submit that this case is such an appropriate  
9 case because the Court has made all the findings that each and  
10 every person who's a member of this class is entitled to each  
11 form of relief. I mean, the Court's class certification order  
12 addressed all the forms of relief under each of the three  
13 subsections of 23(b). So since these class members could get  
14 the same relief no matter what subsection they're under,  
15 there's no reason to preclude them from opting out. I think --

16 **THE COURT:** Well, let me give you a hypothetical.

17 **MS. REYNOLDS:** Okay.

18 **THE COURT:** You've requested and I'm inclined to order  
19 UBH to apply very specific guidelines for these guys: The ASAM  
20 guidelines, the LOCUS guidelines. If someone's opted out, they  
21 could get an order saying "Don't apply those guidelines. Apply  
22 something different." Apply, you know, whatever it is, some  
23 other guideline that they think is more consistent with their  
24 plans, and some judge might agree with them if they've opted  
25 out. They wouldn't be bound by my order.

1 I mean, and there are a number of things in there that are  
2 like that. Your request that I issue an injunction that there  
3 be certain kinds of training, well, a judge might say "Don't do  
4 this kind of training. Do that kind of training." That there  
5 be a new restructuring of some parts of the corporate structure  
6 of UBH, a judge might say in response, "Well, no, no. I don't  
7 want it structured that way. I insist that someone from the  
8 Utilization Committee be on the Guidelines Drafting Committee."

9 You know, so my question is, you know, one can envision,  
10 especially with respect to injunctive relief, and perhaps with  
11 respect to declaratory relief, a situation where at least the  
12 possibility exists that a judge would issue some order  
13 inconsistent with, and directly contrary to perhaps, what I'm  
14 talking about.

15 And so that is the heart of the question here about  
16 whether or not there should be opt-outs and I don't understand,  
17 number one, why. I mean, we allowed opt-outs pre-*Dukes*. We  
18 would need to allow opt-outs post-*Dukes* one would think in  
19 financial cases, in monetary cases because of the due process  
20 concern. That's not this case. That's not why we allowed the  
21 opt-outs from all of the remedies. This is we need some other  
22 reason to do it.

23 So those are my two questions. Isn't it possible there  
24 could be injunctive relief inconsistent with what I'm doing  
25 that these opt-outs would then be entitled to? And, second --

1 and isn't that a danger?

2 And, second, why -- I need a better -- I need a good  
3 justification for why I'm allowing opting out from sections  
4 that by their terms do not permit opt-outs. We can fight about  
5 that, but what I'm concerned about is if you read *Dukes* and if  
6 you have that majority or, heaven forbid, some other majority,  
7 it could easily say, "Listen, Congress put opt-outs in this  
8 section and they didn't put opt-outs in this section so you  
9 can't have opt-outs in this section." I could see them easily  
10 saying that.

11 But I want to have at least some good reason why we have  
12 some discretion because if they allow some discretion, it's  
13 going to have to be for some good reason.

14 So those are my two issues.

15 **MS. REYNOLDS:** Thank you, Your Honor.

16 So the hypotheticals that Your Honor posed about the entry  
17 of injunctions that are actually incompatible, that is  
18 specifically directed to (b)(1)(A) where the class is properly  
19 certified if there's a risk of inconsistent findings that  
20 would -- inconsistent adjudications that would result in  
21 incompatible -- not just different but incompatible standards  
22 of conduct.

23 And even if a subsequent court were to adjudicate a case  
24 brought by one of these 139 people -- which, by the way, the 15  
25 cases or 17 cases that have been identified by UBH are cases in



1 which UBH contends those people are not opt-outs and that's  
2 different from whether or not the opt-outs have brought any  
3 cases, and we don't know whether they have. And I will just  
4 also note that, you know, with the passage of time, the  
5 statutes of limitations are running. This issue is becoming  
6 less of a problem by the day.

7 Let's assume that there were some --

8 **THE COURT:** So whatever you're going to do, wrap it up  
9 in the next two minutes because I'm going to get off and take a  
10 break. Go ahead.

11 **MS. REYNOLDS:** Okay. Well, I just wanted to make the  
12 point that that doesn't make those people who opted out any  
13 different from any other nonclass member.

14 And as the Court is aware, for example, there's another  
15 putative class action pending for people whose claims were  
16 denied the day after the class period ended in this case.  
17 Those people are able to seek whatever relief they desire and  
18 the Court will order what it orders, and there's a possibility  
19 that it might be incompatible. We think very unlikely since  
20 we're the same plaintiffs' counsel but maybe, and that doesn't  
21 make the certification in this case improper and it doesn't  
22 mean that the injunction is any less mandatory for this class.

23 **THE COURT:** Well, I'm going to cut you off there  
24 because I've got to go back into criminal and I'll come back to  
25 this, but I'm going to leave you with the following question:

1 Why do I care what a nonclass member does?

2 The question posed by (b) (1) and (b) (2), and (b) (2)  
3 especially, is whether or not the company would be subject to  
4 inconsistent adjudications. If there's an inconsistent  
5 adjudication that I can cut off with respect to class members,  
6 isn't that something I'm required to do under that unless I  
7 have a particularly good reason?

8 And then we have to get to the particularly good reason,  
9 but I've got to get on a criminal calendar so I'm going to  
10 leave this Zoom. You're all welcome to stay. In fact, I  
11 encourage you to please stay, and I probably will be back in a  
12 half hour to 40 minutes, and just stay within earshot of your  
13 computers if you would. And I apologize for this. It was  
14 unavoidable. This came up last night after close of business.  
15 Okay?

16 All right. I'll be back. Thank you.

17 (Recess taken at 10:28 a.m.)

18 (Proceedings resumed at 11:18 a.m.)

19 **THE COURT:** All right. We'll be back in session.  
20 Sorry it took so long.

21 Let me get my materials in front of me.

22 **THE CLERK:** Sorry. I lost my Internet connection  
23 briefly.

24 **THE COURT:** Welcome back. So we're back in session.

25 So I think I left Ms. Reynolds with a question.

1           **MS. REYNOLDS:** Yes, with a couple of questions,  
2     Your Honor.

3           So you asked why should you care about what nonclass  
4     members do and whether you're required to cut off any  
5     inconsistent cases. And in answer to the first question, the  
6     reason the Court should care is that there's no difference  
7     between a nonclass member and someone who's opted out of the  
8     class.

9           All classes, including (b) (1)/(b) (2) classes, are defined  
10    in such a way as to include some people and exclude others.  
11    And, you know, in this case a perfect example are people who  
12    have non-ERISA plans. So there are plenty of people who had  
13    their claims denied under UBH's guidelines during the class  
14    period, and the only reason they're not part of our class is  
15    because their plan was not governed by ERISA. And it's  
16    possible that those people -- it was always a risk that those  
17    people might seek incompatible relief, but that possibility  
18    doesn't preclude class certification.

19          And whether or not class certification under (b) (1) (A) is  
20    appropriate, it's just that the risk is identified and the  
21    point of class certification in that circumstance is to try to  
22    mitigate that risk, which the Court has done in this case by  
23    certifying the class.

24          And the fact that there are some folks out there who now  
25    fall outside the class doesn't mean that the class is not

1 entitled to injunctive relief. And you see that in, for  
2 example, the *Melendres* case that we cited and other cases where  
3 there's a class that has been defined, they've obtained an  
4 injunction, and the injunction by its nature is going to affect  
5 their people.

6 So in *Melendres*, the class was a class of Latino drivers  
7 who passed through a particular county and there was injunctive  
8 relief designed to prevent racial profiling, and that  
9 injunctive relief was going to benefit, you know, other drivers  
10 who are not Latino, like Black drivers, for example. And that  
11 fact didn't make that injunction nonmandatory. It didn't make  
12 it inappropriate for a (b) (1) class.

13 And the Court asked whether it's required to cut off all  
14 inconsistent cases, and I think that those examples show why  
15 the answer to that is emphatically no. The Court's job is not  
16 to cut off all inconsistent --

17 **THE COURT:** Well, it wasn't quite that. All  
18 inconsistent cases that could be filed by class members seeking  
19 relief inconsistent with the adjudications under (b) (1) and  
20 (b) (2) .

21 **MS. REYNOLDS:** Right, but the people who are members  
22 of the class can't bring an inconsistent case. There are  
23 people who never really became class members because they opted  
24 out.

25 **THE COURT:** No, no, no, no. That prejudices the

1 question.

2 **MS. REYNOLDS:** Fine. But they have been -- they  
3 believe that they have opted out but other than the fact that  
4 they were originally within the class definition, they're no  
5 differently situated than anybody else who was never part of  
6 this case at all but could still seek an incompatible  
7 injunction.

8 **THE COURT:** Well, but that doesn't answer the second  
9 question, which is: Doesn't (b) (1)/(b) (2) require me with  
10 respect to class members not to allow opt-outs in order to cut  
11 off the possibility that a class member before opt-outs would  
12 file something that is inconsistent with the adjudication that  
13 I made?

14 **MS. REYNOLDS:** I mean, the rule doesn't say that. The  
15 rule allows certification when there is a risk. The risk was  
16 identified. The case was properly certified.

17 And I think in this case, you know, the Court made a  
18 determination to manage the class action in this way, and it  
19 didn't create some unmanageable risk of incompatible cases.  
20 It's a very small number of people. And, you know, there's  
21 no -- UBH hasn't cited any case at all in which anyone has ever  
22 actually filed a case trying to get incompatible relief with  
23 the injunctions that the plaintiffs are seeking here. So, you  
24 know, we're not aware of any and UBH hasn't identified any.

25 So by permitting opt-outs, the Court hasn't undermined the

1 purposes of the (b)(1)(A) certification here, and so we don't  
2 see that as a problem.

3 **THE COURT:** Okay. All right. I'll go back to  
4 Ms. Reynolds -- Ms. Romano. Sorry.

5 **MS. ROMANO:** Yes. Thank you, Your Honor.

6 What plaintiffs are arguing here is that the declaratory  
7 relief they're seeking and the prospective injunctive relief  
8 they are seeking, they're not mandatory remedies and that  
9 opt-outs are appropriate, and that essentially means they're  
10 not suitable for certification under (b)(1) or (b)(2).

11 Plaintiffs have also argued that that relief, both the  
12 declaratory relief and the prospective injunctive relief, is  
13 suitable relief under (b)(3). And so if all of that is true,  
14 what that means is that all of the relief being sought in this  
15 case -- reprocessing, prospective injunctive relief, and  
16 declaratory relief -- should be certified under (b)(3) and  
17 that's how this should be resolved.

18 And of course we're not waiving the arguments that no  
19 certification was appropriate here; but if plaintiffs' position  
20 is taken as accurate, then this should be a (b)(3) class.

21 **THE COURT:** Okay. So let's move on to the next topic  
22 area, Texas. I'm worried about Texas for lots of reasons, but  
23 my current worry about Texas is about whether and how to  
24 decertify the Texas members of the state mandate class.

25 What I'm worried about is that we had so little evidence

1 at trial. We had enough to conclude that for somebody in the  
2 class, maybe some multiple somebodies, UBH was violating Texas  
3 state law; but what we didn't have is enough to show anything  
4 about when and for whom UBH followed the forbidden practices  
5 even, I think arguably, where -- but we had the reference to  
6 Houston but I'm not sure that that completely defines it --  
7 and, therefore, for which class members they violated the law.

8 With respect to the others, you know, peak bits of the  
9 class, either of this mandate class or the other classes, it's  
10 clear that with respect to every member of the class, they  
11 violated the law because in all of those instances, there was a  
12 denial that was based on a CDG or whatever it was that I found  
13 was incompatible with the plans.

14 This one is not quite so -- is nowhere -- the evidence was  
15 quite thin, and I am contemplating decertifying the state  
16 mandate class with respect to the extent it alleges a violation  
17 of the Texas state law for the reprocessing remedy because of  
18 that problem.

19 And the question is whether or not in deciding that (b)(3)  
20 question on reprocessing, which is how I approach this because  
21 I think that I may or may not be right that I have to adjust my  
22 thinking and do a decertification on the other aspects of other  
23 pieces of the classes, the reprocessing remedy is a (b)(3)  
24 remedy. And I can't -- I'm worried about the predomination  
25 issue when you can't tell who's in the class and whether or not

1 they were certified -- were properly -- whether the Texas state  
2 rules were properly applied or not without going into each  
3 individual denial letter and making a call based on the  
4 language of that denial letter. And I've got to tell you, the  
5 only example I've got is not a great example for that  
6 predomination issue.

7 And so I'm not -- I can't -- I'm worried that I really  
8 can't reach a conclusion that now that we've had the evidence  
9 that we've had, that class issue is predominant to the  
10 reprocessing remedy because I can't even tell who's in the  
11 class.

12 On the other hand, it is clear that for some class members  
13 in some locations for some time during the class period, UBH  
14 violated Texas law, and so I wouldn't decertify this to the  
15 dec. relief or the injunction, but I'm tempted to do it with  
16 respect to the reprocessing remedy because, you know, you're  
17 going to go in, you're going to get all these individual  
18 letters. We're going to have to go through the letters. I  
19 already know from the letters that I've seen that there's going  
20 to be a fight about whether or not the letter means it was just  
21 or was it not just adjudicated, is it adjudicated under the  
22 Texas statute or was it also adjudicated under the CDG or was  
23 it also -- or what does that mean. So my concern is that those  
24 individual issues will predominate.

25 My questions are as follows: If I do that, I assume I



1 have to give notice to the Texas members because the tolling of  
2 their statute of limitations issue with respect to whatever the  
3 issues are with respect to the reprocessing would cease once I  
4 decertified after they got notice.

5 And then my other questions are: What are the  
6 implications for decertifying as under just the (b)(3) class as  
7 opposed to decertifying under all the subsections, decertifying  
8 all Texas members of the mandated class? Maybe there's no  
9 difference, frankly, as a practical matter, although I guess I  
10 would not be making any findings as to Texas if I did that.

11 And this also raises the *res judicata* implication. If I  
12 decertify the (b)(3) remedy with respect to all of these  
13 members who were insured in Texas and got treatment in Texas,  
14 will they still be able to bring individual actions? I assume  
15 if I just do it under (b)(3), I assume they'll be able to bring  
16 individual actions for nonpayment of benefits. And so that's a  
17 question.

18 And then the final question is: I assume that under  
19 either approach, whether I decertified it entirely or I  
20 decertify it only as to the (b)(3) remedy of reprocessing, that  
21 we don't have to review the denial letters to see which claims  
22 were denied under the CDG or the LOCG as opposed to under the  
23 Texas state guidelines.

24 So those are my questions on Texas, and I'm going to start  
25 with the plaintiff again.

1           **MS. REYNOLDS:** Your Honor, I will get to your  
2 questions.

3           **THE COURT:** Oh, good.

4           **MS. REYNOLDS:** First, I do want to say that we don't  
5 think that there is a basis for decertifying the portion of the  
6 state mandate class that applies to the Texas members.

7           The Court found that all of those members had presented a  
8 common question, which is exactly the same as all the other  
9 state mandate class members, and the Court found that UBH did  
10 violate it -- did violate its duties with respect to these.

11           **THE COURT:** But it's not -- actually now we have the  
12 evidence, and so we know that for somebody they did but we  
13 don't know who or where or when.

14           **MS. REYNOLDS:** What you're talking about, Your Honor,  
15 is really an ascertainability question.

16           **THE COURT:** No. I think it's a predominance question.

17           **UNIDENTIFIED SPEAKER:** The recording has -- this  
18 meeting is being recorded.

19           **THE COURT:** Sorry.

20           **MS. REYNOLDS:** No worries.

21           The question is -- or the concern that Your Honor has is  
22 that there may be letters that cite both types of guidelines.  
23 Is that the issue? That the --

24           **THE COURT:** Well, first of all, that there's no  
25 evidence as to -- there's no evidence in trial on who and where

1 and when.

2 **MS. REYNOLDS:** Right.

3 **THE COURT:** There's none.

4 **MS. REYNOLDS:** Your Honor, I respectfully disagree  
5 with that. The class list that the parties stipulated to  
6 includes about I think it's something like 760 people where the  
7 guideline cited is the LOCG, and these are people whose plans  
8 are governed by Texas law. They're in the state mandate class.

9 **THE COURT:** Well, but we know because of the nature of  
10 those denial letters that some of those people might have been  
11 denied on the basis of the LOCG and not the state-mandated  
12 rules and that may not be the case with respect to others, and  
13 so we're going to have to go through.

14 And what I don't understand is why we can do that now.  
15 Why is that -- isn't that a part of -- now that I know more  
16 about what the evidence is, isn't that part of the  
17 certification question? That is to say, if you have to do that  
18 and you can't tell -- I mean, with respect to the others, it's  
19 pretty simple because there's no competing guideline that they  
20 have to work under.

21 **MS. REYNOLDS:** Uh-huh.

22 **THE COURT:** With respect to the state mandate classes,  
23 it's not so simple. And with respect to Texas as opposed to  
24 the others, it's even less clear because we'd have to go  
25 through and make that determination, and there is no evidence

1 at trial other than sort of the class list, these are the  
2 letters that cited. We don't know what they did with respect  
3 to whether or not they also cited the Texas guidelines. In  
4 fact, we know that one did.

5 **MS. REYNOLDS:** Right. Your Honor, the class  
6 definition states that people are within the class if UBH  
7 denied their claim in whole or in part based on its guidelines.  
8 And so if they're citing both, they clearly fall within that  
9 class definition, and it's not -- the Texas law doesn't say  
10 "ours plus another." It identifies criteria that are supposed  
11 to be used. But if this is a --

12 **THE COURT:** So what does that mean? What does that  
13 mean? I mean, does that mean I should reprocess them even  
14 though just because the letter says both and it technically  
15 fits within the class definition? But what it means is that  
16 you're asking for that class to get a reprocessing remedy, all  
17 of them, even if by citing both it means that actually it was  
18 entirely consistent with the Texas rules, even if the fact that  
19 they cited an LOCG; and that's all that it matters, is that it  
20 was cited. That's how you made the distinction. You took the  
21 letters that actually cited it, but it may turn out that, well,  
22 in this case it's cited but actually they apply to only the  
23 Texas guidelines. I mean, that's my concern.

24 **MS. REYNOLDS:** But, Your Honor, these notices are  
25 not -- they have legal significance. Under ERISA they're

1 supposed to state the reason and the basis for the denial. If  
2 they state in their letter that they base the denial on the  
3 Level of Care Guidelines, the Court can take that as evidence  
4 that that's what they did.

5 **THE COURT:** It's a piece of evidence. There's also  
6 evidence earlier in the same letters that recite the Texas  
7 guidelines. So, I mean, you know, that's my concern, is we're  
8 getting into -- I guarantee you if you have to dig out 800  
9 letters, there will be a fight about 700 of them. There will  
10 be a fight about 700 of them.

11 **MS. REYNOLDS:** We think that people who had their  
12 claims adjudicated in whole or in part under these excessively  
13 restrictive guidelines are entitled to reprocessing. If the  
14 Court is concerned that some letters cite both and the Court  
15 thinks that that's not sufficient to prove our claim, which we  
16 think it is, at a minimum the Court ought to keep in the class  
17 people whose letter only cites the UBH guideline because the  
18 only evidence in the case is that that is incompatible with the  
19 law.

20 There is absolutely evidence that UBH did this, that UBH  
21 wronged people by using its own guideline and not the Texas  
22 guidelines. There is no evidence to the contrary except one  
23 letter that cites both, which we think still violates the  
24 statute.

25 But the Court -- there's no reason to excise from the

1 class people whose claims were only decided under the Texas  
2 guideline. And it's true that in every case, UBH will have to  
3 pull out the class letter. That's just confirming class  
4 membership. It's the first step in --

5 **THE COURT:** I'm not worried about the burden of  
6 pulling out the class letters. I'm not.

7 **MS. REYNOLDS:** I understand the Court is trying to  
8 avoid a dispute about whether citing both violates the statute.  
9 I think there the question is whether the Court should make a  
10 finding that that is not a violation of the law. I mean, the  
11 letter will cite it or not cite it. I mean, it's subjective  
12 and it's easy to tell what reasons were given.

13 **THE COURT:** Are there -- you haven't seen these  
14 letters?

15 **MS. REYNOLDS:** No. They've not been produced.

16 **THE COURT:** Okay.

17 **MS. REYNOLDS:** There was no --

18 **THE COURT:** So the question, Ms. Romano, when we get  
19 to you, is: Are there letters in these 800 that say both? Are  
20 there letters that say just --

21 **UNIDENTIFIED SPEAKER:** The recording has stopped.

22 **THE COURT:** Oh, for some reason Karen keeps -- oh,  
23 hang on a second.

24 (Discussion held off the record.)

25 **THE COURT:** Karen has dropped off, but we've got our

1 court reporter.

2 Jo Ann, I'm going to start recording this again so we get  
3 a little bit of a -- we don't get too much --

4 **UNIDENTIFIED SPEAKER:** This meeting is being recorded.

5 **THE COURT:** All right. I'm sorry. I didn't mean to  
6 interrupt.

7 So the question for Ms. Romano when we get back to her,  
8 not yet, is whether or not there are letters that just cite --  
9 that don't cite to Texas law among the 800; that they don't  
10 cite the Texas guidelines, that they only cite -- I mean, they  
11 all cite an LOCG or a CDG or something, and the question is  
12 whether any of those do not cite the Texas guidelines. That's  
13 the question.

14 Hang on a second.

15 (Pause in proceedings.)

16 **THE COURT:** Okay. Go ahead. Ms. Reynolds, you had  
17 other --

18 **MS. REYNOLDS:** I do.

19 Okay. So the other questions, the questions that the  
20 Court asked was if the Court decertifies a portion of the state  
21 mandate class, does the Court have to give notice. I believe  
22 so. I think it's important to let people know that the tolling  
23 has ended and that if they want to act in their individual  
24 interest, they would need to do so.

25 I do think the Court should only decertify that portion of

1 the case that relates to reprocessing if that's what the Court  
2 is inclined to do. As noted, there is -- the only evidence in  
3 the record is that UBH did, in fact, violate its duties with  
4 respect to some members of -- some Texas members of the state  
5 mandate class and, therefore, that class is entitled to  
6 go-forward injunctive relief and a declaration, and so I think  
7 that would only call for a partial decertification.

8 I think that's -- I think that --

9 **THE COURT:** The other question is: If we do that, do  
10 we not have to review the denial letters, the 800 denial  
11 letters?

12 **MS. REYNOLDS:** If we decertify a portion of the case?

13 **THE COURT:** If I decertify the (b)(3) portion of the  
14 case so that --

15 **MS. REYNOLDS:** I think that's -- I think that's  
16 probably correct. I don't think there's any reason why it  
17 would be necessary to review the denial letters in that case.

18 **THE COURT:** Okay. Ms. Romano.

19 **MS. ROMANO:** Yes. Thank you, Your Honor.

20 I do want to clarify one point with respect to the Texas  
21 members, and by "Texas members" I'm specifically talking about  
22 those who fall into that category of being subject to the Texas  
23 Department of Insurance guidelines fully insured plans  
24 substance use services in Texas.

25 There is no evidence of any class member who was denied



1 authorization or coverage that was subject to the Texas  
2 Department of Insurance guidelines and where the Texas  
3 Department of Insurance guidelines were not used. So it's not  
4 just that we don't know the who or the when; we don't know the  
5 if.

6 We saw there was an e-mail introduced into evidence where  
7 no individual is identified. We don't know if the denials  
8 actually happened, if any did, where Texas guidelines applied  
9 and weren't used. We don't know if it was overturned on  
10 appeal. We don't have the evidence of any class member fitting  
11 this description, and there is no named plaintiff who was  
12 subject to the Texas Department of Insurance guidelines either.

13 And so for that reason, there is a failure of proof here,  
14 individual proof and class-wide proof, to establish liability  
15 with respect to the Texas guidelines.

16 **THE COURT:** Yeah, okay. Well, I obviously already  
17 rejected that line of argument, but let's move on to the  
18 question of decertification.

19 **MS. ROMANO:** So if we are talking about  
20 decertification, the decertification with respect to the Texas  
21 class or the Texas members should be across the board with  
22 respect to all remedies -- prospective injunctive relief,  
23 declaratory relief, and the reprocessing -- because of failure  
24 of class-wide proof to support all three types of remedies.

25 **THE COURT:** Okay.

1           **MS. ROMANO:** With respect to Your Honor's question  
2 relating to the letters --

3           **THE COURT:** Yeah.

4           **MS. ROMANO:** -- I have not reviewed all the letters.  
5 We have not pulled all the letters. I do not have -- I am not  
6 aware of any letter where the Texas guidelines were supposed to  
7 be applied and where the Texas guidelines are not cited, but I  
8 have not reviewed them all so I cannot say that across the  
9 board with respect to all of them.

10          **THE COURT:** Okay.

11          **MS. ROMANO:** With respect to the question of if the  
12 Court decertifies the Texas members either specifically for  
13 reprocessing or decertifies the claims across the board should  
14 a notice go out to those class members, yes, but it would be  
15 defendant's position that this is not a decertification issue,  
16 this is a failure of proof. So the judgment should be granted  
17 in favor of defendant on the Texas issue.

18          **THE COURT:** Okay.

19          All right. The next question is whether and how to --  
20 hang on a second.

21                               (Pause in proceedings.)

22          **THE COURT:** I mean, so just to go back to one point,  
23 nobody believes on either side, I assume, that the dec. relief  
24 portion of this requires an opt-out; that is to say, you know,  
25 just taking the dec. relief as what the plaintiffs have

1 requested, which is mostly -- which is retrospective, it's  
2 somewhat perspective, it depends on how you look at those  
3 terms, I take it none of you believe that class members had to  
4 be permitted to opt out any portion of the dec. relief.

5 **MS. REYNOLDS:** Your Honor, no, the plaintiffs do not  
6 believe an opt-out is required for declaratory relief unless  
7 it's ordered only under (b) (3) because (b) (3) requires  
8 opt-outs.

9 **THE COURT:** Right. But as to this dec. relief that  
10 you have requested --

11 **MS. REYNOLDS:** It's not -- you're right. It's not  
12 because of declaratory relief. It's the only reason the  
13 opt-out was permitted -- was required in this case was because  
14 the court certified a (b) (3) class.

15 **THE COURT:** Fine. But if it was just certified under  
16 (b) (1) and (b) (2), you would say it's not required --

17 **MS. REYNOLDS:** That's right.

18 **THE COURT:** -- as to the relief you've requested?

19 **MS. REYNOLDS:** Correct.

20 **THE COURT:** Okay. And you don't disagree with that,  
21 Ms. Romano, I assume?

22 **MS. ROMANO:** We have many objections to the  
23 declaratory relief sought but if the Court certifies it under  
24 (b) (1) and (b) (2) only, then opting out would not be permitted.

25 **THE COURT:** Right. Got it.

1       So as to class members who received their benefits on  
2 appeal, I've got to figure out what to do with those folks. I  
3 assume that if you received your benefits on appeal, we have an  
4 Article III standing issue as to those people because they  
5 received their benefits. Paying close attention to standing at  
6 the remedy phase as full directs, it would seem that that's an  
7 issue.

8       It also seems to me that there's a typicality problem if  
9 they -- you know, the rest of the class didn't receive benefits  
10 but these people did, it would seem to me that we need to  
11 decertify as to the class members who received their benefits  
12 on appeal.

13       And the question is: As to what? Is it all three? Is it  
14 both the dec. relief and the injunctive relief and the  
15 reprocessing? That's my inclination. And I assume -- and the  
16 question is that these people should get notice if there's a  
17 decertification. So we'll start with plaintiff again.

18       **MS. REYNOLDS:** Right. So limiting now to the people  
19 whose denials -- who appealed their denials and the denials  
20 were reversed. Well, as an initial matter, Your Honor, we  
21 don't agree that those people were not injured. We don't agree  
22 that those people lacked Article III standing. They were  
23 subjected to these wrongful guidelines. They did have a  
24 wrongful denial and, at a minimum, they're entitled to  
25 injunctive relief going forward and declaratory relief; right?

1       The reason their claims were denied was because even UBH  
2 found that they were sick enough to need the treatment under  
3 its restrictive guidelines. So it doesn't -- the fact that  
4 they got some coverage through the appeal process doesn't undo  
5 the original -- or the use of these bad criteria and it doesn't  
6 mean they're protected in the future, and that's why injunctive  
7 relief is needed for that class.

8       I think we tend to agree that doing a full reprocess for  
9 those folks isn't necessary because UBH has already reached a  
10 conclusion that shows that its original denial is wrong; but we  
11 do think that at a minimum UBH should confirm that those people  
12 did, in fact, get everything that they were asking for and not  
13 just a portion. Sometimes a person asks for relief or coverage  
14 for a certain number of days and then if UBH overturns it, they  
15 may overturn it for only a portion of that time.

16       **THE COURT:** Okay.

17       **MS. REYNOLDS:** And if the Court, you know, determines  
18 that it's going to decertify this class in part, you know,  
19 again, I think it would be only as to the reprocessing or part  
20 of the reprocessing and not to the other forms of relief. And,  
21 yes, we think that notice should be provided to anyone who is  
22 removed from a class.

23       **THE COURT:** Hang on a second. Let me look at  
24 something. I wanted to check one thing.

25                   (Pause in proceedings.)

1           **THE COURT:** So how have these people been identified  
2 so far?

3           **MS. REYNOLDS:** The people whose claims were reversed  
4 on appeal?

5           **THE COURT:** Right.

6           **MS. REYNOLDS:** I believe that they can be identified  
7 in UBH's claims databases.

8           **THE COURT:** Okay.

9 Okay. Let me hear from Ms. Romano on this group.

10          **MS. ROMANO:** Yes, Your Honor.

11 For individuals who appealed and received the benefits  
12 that they were seeking --

13          **THE COURT:** So when you say that, do you mean received  
14 all of the benefits they were seeking?

15          **MS. ROMANO:** Yes, Your Honor.

16          **THE COURT:** Okay.

17          **MS. ROMANO:** -- they suffered no concrete injury  
18 caused by the conduct at issue in this case and, therefore,  
19 should not be part of a certified class with respect to any of  
20 the remedies at issue.

21          **THE COURT:** Okay. And how do you -- and have you  
22 identified the folks who've had their -- received all of what  
23 they were seeking on appeal of the denial?

24          **MS. ROMANO:** I'm going to defer to my partner,  
25 Ms. Ross, on the class issues --

1           **THE COURT:** Okay.

2           **MS. ROMANO:** -- class list issues.

3           **THE COURT:** So I can't hear you, Ms. Ross, for some  
4 reason.

5           **MS. ROSS:** Can you hear me now?

6           **THE COURT:** Yes.

7           **MS. ROSS:** Okay. Excellent. Thank you.

8           So with respect to identifying all of the members who had  
9 their benefits paid on appeal, we haven't gone through that  
10 exercise. As Ms. Reynolds notes, UBH does have claims  
11 databases, appeal databases, and initial denial databases, and  
12 it would be an exercise that would involve some  
13 cross-referencing between those to identify that group of  
14 people. We haven't done that exercise yet.

15           I believe the evidence in the record from trial from  
16 Ms. Bridge is that the overturn rate on appeal is  
17 approximately, I believe, 30 percent. I may be off on that,  
18 but I think it's about 30 percent. So we would anticipate that  
19 it would be a considerable number of people within the class  
20 who would fall into this category.

21           **THE COURT:** Okay. Yeah, it sounded like you estimated  
22 at some point that there was about 3 percent of the class.

23           **MS. ROSS:** Yes. I think we estimated that based on  
24 the sample that we did and where we looked at a number of  
25 claims that were underlying here in the case and looked at the

1 outcome of each of those. We did not look to the  
2 administrative record in each one of the class members' records  
3 that were part of the case.

4 **THE COURT:** Okay. All right.

5 Okay. The next question that has been raised, we talked  
6 about and you've spoken about in your supplement is whether and  
7 how to decertify with respect to class members who fall within  
8 the class definition based on their denial at the  
9 administrative appeal level or whether to add them to the class  
10 list.

11 You made up a class list based on, I guess, initial denial  
12 letters and so for some reason these folks -- for that reason,  
13 these folks were left off and never got notice.

14 I'm a little concerned that we're sort of boxed in now by  
15 that, that due process, and Rule 23 because of due process  
16 requires a notice that's reasonably expected to meet these  
17 people before you bind them to anything, that the method of  
18 notice that we used was not reasonably expected to meet these  
19 people -- get to these people. It's not like it was an ad on  
20 the Internet or in a newspaper when we had newspapers that  
21 somebody might read or somebody might not read. We left them  
22 off the list deliberately because of the way we -- because of  
23 attributes of their claim, as to the timing of when they were  
24 denied.

25 It seems to me it's very hard to argue that the due



1 process standard was met by that because they couldn't  
2 reasonably be expected to get notice from this. And that if  
3 they weren't, I'm not sure that I can do anything about it now;  
4 that is to say, I'm not sure that I feel comfortable binding  
5 them to the rulings of this Court, leaving aside whether it's a  
6 good ruling or a bad ruling or in favor of them or against  
7 them, because of that lack of notice.

8       It seems to me it is probably too late to give them notice  
9 now and give them a chance to opt out because of the problem  
10 that I've already made substantive rulings largely in their  
11 favor. I've made some rulings against them, but I'm not sure  
12 that -- you know, and somebody might view those rulings with  
13 favor or disfavor; but the fact that they have the rulings and  
14 it's this one-way *collateral estoppel* problem, I'm not sure  
15 that I could -- I'm pretty sure I couldn't give them a right to  
16 opt out now, but what I could do is decertify them so they're  
17 not bound by any of this.

18       And so that's the question. That's what I'm thinking of  
19 doing as to those folks.

20       And then the other questions I have on this group is how  
21 to identify them. If I decertify with respect to them, do I  
22 need to give them notice even though I didn't give them notice  
23 in the first place? I don't know. Probably not.

24       And does this have any impact on -- or should it have any  
25 impact with respect to the (b)(1) and (b)(2) remedies? They

1 were part of the (b)(1) and (b)(2) class. They were not  
2 entitled -- strictly speaking, you don't have to give them a  
3 right to either notice or opt out under the (b)(1) and (b)(2)  
4 remedies so I'm wondering if I should keep them in for that  
5 purpose. I don't even have to come up with a class list for  
6 that purpose.

7 So that's my questions as to that. Let's start with  
8 Ms. Reynolds.

9 **MS. REYNOLDS:** I'm going to defer to Mr. Abelson on  
10 this issue.

11 **MR. ABELSON:** Your Honor, so as to these questions, a  
12 few points.

13 First of all, Your Honor referenced to leaving them off  
14 deliberately. I understand the context but just to make clear,  
15 the interrogatory that we issued that initiated this process  
16 didn't seek information about benefit claims that were denied  
17 and for which -- and referred to the final denial. Certainly  
18 the parties went back and forth and that is what it is, and we  
19 agreed that they were not included.

20 **THE COURT:** And we all agreed on the way it was done.  
21 You agreed. They agreed.

22 **MR. ABELSON:** Yes.

23 **THE COURT:** It's not like it's a question. Regardless  
24 of what your original question was, your ultimate answer was a  
25 method that would leave off anyone whose denial was on appeal.

1           **MR. ABELSON:** We did. I mean, just to be clear, we  
2 didn't understand at the time, and not to point fingers, but we  
3 didn't understand at the time that the field that refers to the  
4 basis for denial in the database doesn't change if there is an  
5 appeal on the basis of denial changes.

6           **THE COURT:** Okay. Whatever.

7           **MR. ABELSON:** We didn't understand that information,  
8 so --

9           **THE COURT:** I'm sure you didn't deliberately seek to  
10 exclude these people. I understand that. You didn't know they  
11 were there.

12           **MR. ABELSON:** In terms of due process, I understand  
13 the concern, that we see the due process analysis is for the  
14 class overall. We do think that we took reasonable efforts to  
15 notice the class.

16           And a related issue is to the extent that what is  
17 motivating the Court's concern is a preclusion or *res judicata*  
18 issue, in this hypothetical scenario that one of these people  
19 files a case and raises an issue, they can certainly argue that  
20 they didn't get notice and that the notice in this case wasn't  
21 reasonably calculated to give them notice. So I do think this  
22 is an issue that could be -- maybe most appropriately would be  
23 decided by such a hypothetical court.

24           In terms of the --

25           **THE COURT:** So where's the case that says that it is

1 reasonable notice to the class as a whole? I mean, first of  
2 all, that's the first question. Where is the case that says  
3 it's got to be reasonable notice to the class as a whole even  
4 if it in hindsight specifically excludes by its method some  
5 class of people that are within the class?

6 **MR. ABELSON:** I can't cite a case on that. I'm  
7 thinking mainly of just the language of Rule 23.

8 **THE COURT:** It says "reasonable notice to the class."

9 **MR. ABELSON:** The best notice that is practicable  
10 under the circumstances.

11 **THE COURT:** Well, the best notice as practicable under  
12 the circumstances would be to give them actual notice just like  
13 we did to the rest of the class.

14 **MR. ABELSON:** Right. And that, I think, is mainly a  
15 question for UBH. My understanding is that they think it is  
16 not practicable to go through those appeal letters and identify  
17 one way or the other -- to identify whether the basis on appeal  
18 was different than on appeal -- than the basis on -- the  
19 initial basis.

20 And also another relevant point, I think, is that  
21 notice -- just to be clear, notice was accomplished in a number  
22 of ways. One was sending notice to individual people. Another  
23 was through the website to anyone. And we know that, because  
24 we've gotten a lot of calls, a lot of people were paying  
25 attention to this on their way to the website and contacted us

1 even if they were not class members.

2 I think the last piece of the Court's -- the last question  
3 was with respect to if the Court decides to, I suppose,  
4 decertify with respect to the (b)(3) portion --

5 **THE COURT:** Yeah.

6 **MR. ABELSON:** -- if that's the way the Court goes,  
7 what would be the implications with respect to (b)(1) and  
8 (b)(2), and I would say there should be no consequence.  
9 They're entitled to injunctive and declaratory relief just like  
10 anybody else.

11 **THE COURT:** They're entitled to -- well, so you think  
12 I can, despite the fact -- because they're not entitled to  
13 notice on (b)(1) and (b)(2), even if they have to have a notice  
14 required under (b)(3), I can bind them to the first part?

15 **MR. ABELSON:** (b)(1) and (b)(2) don't require notice  
16 and so if the Court's concern arises from notice but otherwise  
17 UBH is liable, then I suppose there's no issue.

18 **THE COURT:** So I wouldn't have to go about finding  
19 them?

20 **MR. ABELSON:** I think that's right.

21 **THE COURT:** Okay.

22 **MR. ABELSON:** I mean, and I guess I'll just add that  
23 our understanding from UBH is that this is not a sizable  
24 population, the number of people. Our understanding is that  
25 the basis for denial rarely changes from administrative to

1 clinical guideline based. We know there are some, three who  
2 happen to have contacted us, but our position would be that  
3 they are class members. UBH should just look at the appeal  
4 denial letters and identify those folks, especially if it's the  
5 case, as they suggest, that this is a small population.

6 **THE COURT:** Well, they'd have to look through all the  
7 denial letters for appeals of the entire class to figure that  
8 out; right?

9 **MR. ABELSON:** Well, not necessarily. There are some  
10 types of administrative denials -- there's some types of  
11 administrative denials that I think would be more likely than  
12 others to end up with a guideline-based denial on appeal.

13 So, for example, lack of information is one way that  
14 commonly an initial denial is coded. For example, my  
15 understanding is that if the peer reviewer can't reach the  
16 doctor and that if they do reach the doctor and make a  
17 determination with clinical evidence, then they convert the  
18 denial to guideline base. So it may be that that is the form  
19 of the administrative denial that would be the most likely or  
20 we would conclude is most likely to lead to such an appeal  
21 denial.

22 **THE COURT:** Let me hear from Ms. Romano on this  
23 question.

24 **MS. ROMANO:** And Ms. Ross is going to be handling  
25 these issues.

1           **THE COURT:** Ms. Ross. I'm sorry.

2           **MS. ROSS:** Thank you, Your Honor. Can you hear me  
3 now? I don't have enough --

4           **THE COURT:** Yes. Yes.

5           **MS. ROSS:** Okay. Excellent.

6           With respect to these folks, as Your Honor says, this is  
7 something that has come up very, very late in the game, well  
8 after the class list was decided, well after we negotiated and  
9 stipulated that list and everyone agreed to the process used to  
10 create it. Both parties understood throughout the process that  
11 the database that was used to create that list was the initial  
12 adverse benefit determination data from the initial  
13 determinations, and both parties agreed to that.

14           So as you note, Your Honor, the parties made no effort to  
15 notice the group of people that you are talking about. And I  
16 would agree with you that consistent with due process, they did  
17 not receive notice that would meet the requirements of due  
18 process and, therefore, did not have a meaningful opportunity  
19 to opt out of the class.

20           We would also agree with you, Your Honor, that it is too  
21 late to allow an opt-out right now after substantive rulings  
22 have been made in the case and that to do so would violate the  
23 rule against one-way intervention and prejudice UBH were that  
24 to be allowed.

25           With respect to your sort of particular questions about if

1 we were to decertify as to these people, how would we do that,  
2 do they need notice and what would that look like, since there  
3 was no notice issued to this group in the first place, we don't  
4 believe it would be necessary to provide them with notice at  
5 this stage.

6 Another way to go about this, Your Honor, would be to  
7 amend the class certification order in order to amend the class  
8 definition so that it was clear that the class that was  
9 certified here relates to the initial denials of benefits  
10 rather than sweeping in this -- questionably sweeping in this  
11 group of people that was never contemplated to be subject to  
12 notice in the case.

13 With respect to how to identify them, I think Mr. Abelson  
14 has hit on this, frankly, in his own explanation of it. It is  
15 a very individualized question. There are different scenarios  
16 that could give rise to an administrative denial being  
17 converted to a clinical appeal; and, in particular, we'd be  
18 looking at things like eligibility determinations that were  
19 then reviewed and found not to be correct and then there was a  
20 clinical appeal.

21 There could be, as Mr. Abelson notes, situations where  
22 information that was required to be provided by the member  
23 during a particular time window was not provided and, as a  
24 result, the denial issued on an administrative basis; but if  
25 there was later an appeal in certain situations, that appeal



1 may have been reviewed on a clinical basis. But the only way  
2 to determine whether, in fact, that is the case for any  
3 particular administrative denial would be to look at the  
4 individual records for that denial and to look to see whether  
5 there was an appeal and to look to see whether that appeal was  
6 addressed on a clinical basis.

7 Mr. Abelson suggests that there may be buckets within the  
8 administrative denials that are more likely to lead to  
9 something else but I think, Your Honor, that just emphasizes  
10 the individuality of this question and the inability to do this  
11 on a class-wide basis. I would also note that there is no  
12 proof in the record with respect to any of these people,  
13 certainly no common proof.

14 So as both a practical matter and a matter of  
15 constitutional due process and Rule 23, we would agree with  
16 Your Honor's inclination that these people are not in the  
17 class, notice was not given to them, and they should not be in  
18 it.

19 In terms of how to, then, carve them out is either  
20 decertification with respect to that population or, you know,  
21 basically the same effect would be modifying the class  
22 definition to be clear that people whose clinical determination  
23 was only on an appeal are not included in the class.

24 **THE COURT:** What about the (b) (2) / (b) (3) issue?

25 **MS. ROSS:** Well, what we heard from Ms. Reynolds

1 earlier was that class members should be able to opt out of all  
2 of the remedies, which would essentially render them all (b)(3)  
3 remedies. If that's the case, then they need to be included.

4 **THE COURT:** That's a nonsense response. I'm not going  
5 to have you pick up on some stray remark. It just doesn't help  
6 me in this decision. I want to know whether or not I can --

7 **MS. ROSS:** Fair enough. No, if, in fact, what  
8 Your Honor is inclined to do is to separate the remedies so  
9 that certain remedies are issued under (b)(1) and (b)(2) and  
10 others under (b)(3), then with respect to the mandatory  
11 remedies of (b)(1) and (b)(2), if the class definition is  
12 changed, those people would not be part of that but it wouldn't  
13 be necessary to do that because the opt-out issue and the due  
14 process and late intervention issues would not be in play with  
15 respect to mandatory remedies.

16 **THE COURT:** So I'm forced to ask this question,  
17 although I'm not sure I want to ask it or I think I know the  
18 answer, but the question is this: You think it's not practical  
19 to give these people notice? I mean, that's what you're  
20 saying. I mean, doesn't that mean that "We did the best we  
21 could in the initial -- they're in the class definition. We  
22 did the best we could noticing the class. It's not practical  
23 to give these few people the kind of notice we give everyone  
24 else. There was a website created, but we couldn't do any --  
25 we gave the best practical notice under the circumstances --

1 practicable notice under the circumstances so the  
2 constitutional due process is satisfied"?

3 **MS. ROSS:** Respectfully, Your Honor, I would say  
4 that's a little bit revisionist in that I think the parties  
5 both agree that there was not an effort made to give notice to  
6 these people.

7 **THE COURT:** That's not the test. I'm not revising.  
8 The question is: If I'm going to say that it was a due  
9 process -- we didn't comply with the due process rights of  
10 these folks so we couldn't be binding them to my determinations  
11 against them or for them, if we're going to do that, the test  
12 is whether or not we gave the best practicable notice to them  
13 in the circumstances. We gave whatever notice we gave for  
14 whatever reason we gave it. Fine. That notice was given.  
15 Didn't you just make the argument that goes to showing that  
16 that was the best practical notice we could have given?

17 **MS. ROSS:** I don't think that's necessarily correct,  
18 Your Honor, because, frankly, the parties never attempted to  
19 notice these people. So perhaps there would have been a better  
20 way to do it if we had tried to do it.

21 **THE COURT:** Like what? Like what?

22 **MS. ROSS:** I mean, like I said, we haven't tried. We  
23 do know that there are serious challenges in the databases in  
24 terms of being able to identify them; that to identify them is  
25 an individualized inquiry that would require us to go page by

1 page through administrative records for each one of the  
2 administrative denials where we know the vast majority are not  
3 going to produce a class member because they're going to be  
4 administrative in terms of how they were handled, but that we  
5 can't connect those to the clinical denial database in an  
6 automated way that would allow us to identify them.

7 **THE COURT:** Okay.

8 All right. So we're going to stop again. This time we're  
9 going to stop for one hour and then I've got a couple follow-up  
10 questions, and then we're going to turn to remedies issues.

11 Okay? All right. Thank you-all.

12 **ALL:** Thank you, Your Honor.

13 **THE CLERK:** Court stands in temporary recess.

14 (Luncheon recess taken at 12:16 p.m.)

15 **Afternoon Session**

**1:14 p.m.**

16 **THE CLERK:** Okay. We are resuming Case  
17 Number 14-cv-2346, Wit vs. UnitedHealthcare, and the related  
18 case 14-cv-5337, Alexander vs. United Behavioral Health.

19 **THE COURT:** All right. Everyone's here.

20 So I had a couple of questions I wanted to ask before we  
21 turn to remedies. So we're going to take -- well, this isn't  
22 really a question. We're going to take the 170 individuals  
23 whose denials were administrative off the class lists. I think  
24 that's stipulated to at the trial. We don't have to go any  
25 further into that.

1       The correction of the end date for the Illinois portion of  
2       the Wit state mandate class, am I correct that the end date  
3       should be changed from June 1, 2017, to January 1, 2016, to  
4       reflect the Court's finding UBH started using ASAM Illinois on  
5       that date?

6               **MS. REYNOLDS:** I believe that's correct, Your Honor.  
7       We agree that it should be corrected.

8               **THE COURT:** Okay.

9               **MS. ROMANO:** Your Honor, we agree as well. I will ask  
10      my colleagues to check and make sure that those dates are  
11      accurate. I'll correct them by the end of the hearing if they  
12      are not, but otherwise we would agree.

13              **THE COURT:** Okay. And so the current number of  
14      notices that have been sent, I've seen a couple of different  
15      numbers, and opt-outs, am I right there are 139 opt-outs out of  
16      63,292 notices that were sent?

17              **MS. REYNOLDS:** Yes, that's correct. You may have seen  
18      a different number for opt-outs because some people opted out  
19      even though they were never actually class members so they've  
20      been weeded out.

21              **THE COURT:** Okay. Great.

22              So there's been some discussion about, and I don't really  
23      want to get into the merits that this question underlines, but  
24      I think it's pretty clear now that at least some of the named  
25      plaintiffs are still covered under UBH's plans that have a

1 medical necessity requirement. Does UBH agree with that?

2 **MS. ROMANO:** Yes, there are at least a few.

3 **THE COURT:** Okay. And then the last question is: If  
4 I do one of these things where I decertify as to certain  
5 subsets of the classes and I can't -- what happens is I give  
6 notice? And my recollection, does everyone agree and stipulate  
7 that the tolling that's applicable to those people continues  
8 until they receive that notice?

9 **MS. REYNOLDS:** I believe that's correct. I'm going to  
10 ask my colleagues to speak up if they disagree with me.

11 **THE COURT:** It's really a question for Ms. Romano too.

12 **MS. ROMANO:** Yes, Your Honor.

13 I would want to confirm that on the case law before I  
14 confirm that on the record.

15 **THE COURT:** Well, we could stipulate to it right now.

16 **MS. ROMANO:** I am not prepared to, Your Honor, because  
17 I would want to confirm that in the case law first.

18 **THE COURT:** Well, regardless of whether it's case law,  
19 will everyone agree that -- will UBH agree that those people's  
20 claims that might -- for which they might lose tolling because  
21 there's a decertification, that tolling will continue until,  
22 you know, a reasonable time after the notice is sent?

23 The reason I'm asking that is because, you know, it's  
24 about what we do first. If you-all want to draft the notice  
25 now and I'll just include it as part of my order, I can do

1 that, but this seems a much more rational way of doing it.

2 **MS. ROMANO:** Yes, Your Honor. I am not in a position  
3 to stipulate to that right now.

4 **THE COURT:** Great. Then you probably -- let me ask  
5 the next question. Let's see...

6 Okay. I don't have any questions on this, but I certainly  
7 will let you argue about it if you want. I'm not inclined to  
8 let UBH deny claims on reprocessing for reasons not previously  
9 included in their stated reasons for denial in their first  
10 administrative attack at this. I think that the -- I don't --  
11 I think it's pretty clear we have authority to do it, to limit  
12 the reprocessing remedy. No case says we can't, and there's a  
13 couple of cases that say we can do it. And the *LP* case, for  
14 all your what I thought was pretty clever ways to try to  
15 distinguish it, is on all fours, although it's just a district  
16 court case. The court clearly stated in connection with a  
17 remand for reprocessing that it would not allow the medical  
18 necessity ground to be raised even though the defendant wanted  
19 to raise it. So I think it's pretty clear we have the scope to  
20 do it and I would do it.

21 **MS. ROMANO:** Your Honor, can I be heard on that  
22 briefly?

23 **THE COURT:** Yes. Sure.

24 **MS. ROMANO:** Thank you very much.

25 First of all, defendant disagrees with respect to whether

1 there's any authority that does support it, and Your Honor  
2 noted the distinguishing of the *LP* case. And, in fact, the  
3 bulk of the cases that plaintiffs cite all relate to raising  
4 new issues during the litigation and not during reprocessing,  
5 and this really gets to the nature of the reprocessing remedy.  
6 It's a full remand back to the administrator to reprocess the  
7 claims, which is highly distinguishable from the *Harlick* case,  
8 the *Spinedex* case, which really were focused on sandbagging and  
9 litigation after the administrative record was closed. Here  
10 the administrative record will be reopened. That's the nature  
11 of the reprocessing.

12 And the other very important issue to note here is that  
13 the class list is based on individuals who were denied requests  
14 for authorization for treatment. This is typically at the  
15 preservice stage. So before a member has received any services  
16 at all, there was some request made by the provider or the  
17 member asking for authorization for coverage for the services,  
18 and the class members here are triggered to be on the class  
19 list because there was a denial of coverage based on one of the  
20 guidelines that are challenged here.

21 But there may be many reasons why one may be ultimately  
22 denied benefits. Whether it is eligibility or whether it is  
23 the licensing of the provider doesn't satisfy coverage  
24 requirements; and if those were not mentioned, were not raised  
25 in the original denial, UBH should still have the discretion,



1 as it is given under the plan, to evaluate that and include  
2 that in the reprocessing remedy.

3 This is particularly the case -- and I don't know whether  
4 plaintiffs dispute this at all -- that if a claim comes in  
5 later, so if the authorization is denied but a claim for  
6 payment comes in later after services are provided, there are  
7 many reasons why that claim may be processed in a certain way.  
8 It could be denied for payment because the services don't match  
9 what was authorized. It may be denied because of eligibility,  
10 licensing, coding issues, or paid in a certain way based on the  
11 plan with co-payments and other member responsibility, and so  
12 those are all the variety of reasons that could come into play  
13 when it comes to reprocessing and paying claims and UBH should  
14 not be precluded from raising any of those based on the  
15 discretion granted under the plans.

16 **THE COURT:** Ms. Reynolds.

17 **MS. REYNOLDS:** Yes.

18 Your Honor, Ms. Romano has done a nice job of summarizing  
19 various grounds on which claims can be denied, but the fact  
20 remains that UBH had a duty to identify all of the reasons for  
21 denying a claim when it did it the first time around.

22 **THE COURT:** What about the ones it couldn't? So, for  
23 example, it was they won't pay the whole claim because it's --  
24 and we'll get to this later, but I'm not really concerned about  
25 substantive grounds or administrative grounds for denying

1 claims because I think she's wrong.

2 What I think is the nub of the issue that I think we're  
3 going to have to grapple with is there may be reasons why  
4 someone shouldn't be paid what they're asking for. So it may  
5 be that they took -- they went to -- does it matter that they  
6 got a different level of care than what they applied for? Or  
7 does it matter that they went and they did it to someone who's  
8 not in the network, out of network? They pay different amounts  
9 for out of network.

10 So there's lots of different reasons that have to do with  
11 is there -- you know, maybe the co-pays fall in the same  
12 bucket, but there's a bucket of things that have to do with how  
13 much is paid more than they do, although the different level of  
14 care is a complex one. But what do you do about those?

15 **MS. REYNOLDS:** Well, actually I think those are two  
16 different issues.

17 **THE COURT:** Okay.

18 **MS. REYNOLDS:** So as Ms. Romano stated, when someone  
19 seeks preauthorization, they're seeking it for a specific level  
20 of care with a specific provider. So it's not just kind of in  
21 a vacuum. So if they then go and get a different level of  
22 care, that's really a different request for coverage, and I  
23 don't think that those other levels of care are really even at  
24 issue in this case.

25 **THE COURT:** No, but I can see it in reprocessing.

1 It's going to come up that they came -- they went -- they  
2 couldn't get level of care A because it wasn't covered. They  
3 said no. So they went and got level of care B, which is  
4 cheaper, but they did it anyway.

5 **MS. REYNOLDS:** Correct.

6 **THE COURT:** Or they got level care C, whatever it was,  
7 because it was somewhere else and they just decided to pay for  
8 it.

9 **MS. REYNOLDS:** So --

10 **THE COURT:** What about that?

11 **MS. REYNOLDS:** Sorry. I don't mean to interrupt,  
12 Your Honor.

13 **THE COURT:** That's all right.

14 **MS. REYNOLDS:** So the thing that is being reprocessed  
15 here is UBH's clinical determination about whether the services  
16 that were requested are consistent with generally accepted  
17 standards of care. If someone went off and did something  
18 different, I don't think that that's really at issue; right?  
19 UBH is going to decide whether its original determination was  
20 right or wrong. If they then didn't go on to get the services  
21 that they requested, they got something different and either  
22 got coverage or didn't get coverage for it, that's really a  
23 different issue. Or if they couldn't afford to get anything --

24 **THE COURT:** What's the answer to that?

25 **MS. REYNOLDS:** What's that?

1           **THE COURT:** What's the answer to that issue then?

2           **MS. REYNOLDS:** No, I'm sorry. They should have sought  
3 coverage for that other level of care at the time.

4           **THE COURT:** I see. Okay. So that will be --

5           **MS. REYNOLDS:** I just mean it's not at issue in this  
6 case.

7           **THE COURT:** Well, it might be at issue in this case.  
8 We don't know.

9           **MS. REYNOLDS:** Yes, but if they were denied; right?  
10 If it's one of the covered -- one of the levels of care that's  
11 part of the case. So if they were denied RTC and then  
12 subsequently denied --

13           **THE COURT:** I'm not making myself clear.

14           **MS. REYNOLDS:** Okay.

15           **THE COURT:** If someone was denied a particular request  
16 for a level of care to which they were entitled -- okay -- and  
17 on reprocessing it -- and then we go into reprocessing, it  
18 turns out they got something different than what they asked  
19 for, they went out and got something different, you're saying  
20 UBH does not have to reimburse for that?

21           **MS. REYNOLDS:** No, I don't -- I don't believe so. I  
22 mean, I think the question is whether they --

23           **THE COURT:** "I don't believe so." What does that  
24 mean? You don't believe that UBH has to reimburse for anything  
25 other than the exact care that they should have approved?

1           **MS. REYNOLDS:** Right.

2           **THE COURT:** Okay.

3           **MS. REYNOLDS:** And I'm being cautioned -- I received a  
4 note. I just want to make clear that the parties have a  
5 difference of opinion about how ASAM applies, and I just want  
6 to be clear that if someone sought coverage for substance use  
7 treatment and they were denied because UBH was using a standard  
8 for a higher level of care but what they were receiving was --  
9 what they were asking for and sought and received was a lower  
10 level under ASAM, that that's not exactly the same situation as  
11 what Your Honor was just speaking about.

12           **THE COURT:** No. Because in that case they were denied  
13 a level of care that you say, using ASAM or using the  
14 appropriate standard, they should have been approved for.

15           **MS. REYNOLDS:** Yes. Yes, exactly.

16           **THE COURT:** But if they went out and got something  
17 that is different than what they applied for, they don't get  
18 reimbursed for that?

19           **MS. REYNOLDS:** No. We haven't asked that they get  
20 that relief. I think this is about whether they get the relief  
21 that they originally requested -- or the benefits, excuse me,  
22 that they originally requested.

23           **THE COURT:** Yeah, I know. We don't want to call it  
24 something that makes it more complicated to argue against  
25 Ms. Romano's (b)(3) argument. But whatever it is, at the end

1 of the day, because I don't know that it matters very much for  
2 the (b) (3) argument, but at the end of the day you don't expect  
3 UBH to pay for anything other than the level of care than what  
4 was applied for?

5 **MS. REYNOLDS:** Correct.

6 And then with respect to Ms. Romano's reference to -- or I  
7 guess actually this was something Your Honor brought up,  
8 whether or not something's in or out of network, co-pays,  
9 co-insurance, things like that, that we anticipate would be  
10 processed in the normal course.

11 So, you know, the goal here is to put the beneficiaries  
12 back in the position that they would have been in but for the  
13 breach, which means they're at the end of the claims  
14 administration process. The only thing left is this medical  
15 necessity decision; and if it goes their way, then UBH  
16 processes the claims, which means they calculate the amount of  
17 benefits. And I think that would just occur as normal, and  
18 they would either get the in- or out-of-network rate that they  
19 were entitled to.

20 **THE COURT:** So just to make sure I understand what  
21 you're saying, look at your proposed order --

22 **MS. REYNOLDS:** Okay.

23 **THE COURT:** -- and tell me where it makes it clear  
24 that that's what's going to happen because I'm a little  
25 concerned that it doesn't. It's Section II of subdivision D, I

1 think, and I'm not sure that it makes it clear either that  
2 you're only calculating benefits that are due for the requested  
3 services that were actually paid for and received even though  
4 they were denied; right? So it only applies to people who  
5 actually went out and got it.

6 **MS. REYNOLDS:** Uh-huh.

7 **THE COURT:** That's not clear to me, number one.

8 And, number two, this second piece that you're talking --  
9 and that it's only as to the -- for what was originally  
10 requested.

11 And, number two, it doesn't seem to me particularly clear  
12 that they can't -- you know, that they can't say, "Well, this  
13 was an out of network so it's this amount" when the approval  
14 would have been somebody in network or the approval would have  
15 been somebody in network but you would have still had a \$2,000  
16 co-pay or whatever it is. It's not very clear in this how they  
17 get to do that.

18 **MS. REYNOLDS:** Well, I mean, I guess that's what's  
19 intended in Section II.C where we say "UBH will then calculate  
20 the amount of benefits a class member is owed under the terms  
21 of the applicable plan in effect at the time the request for  
22 coverage was originally received." Meaning that UBH --

23 **THE COURT:** Okay.

24 **MS. REYNOLDS:** And then the next paragraph says that  
25 it would be "UBH shall include coverage for all services

1 received by the class member at the requested level of care."

2 **THE COURT:** So you --

3 **MS. REYNOLDS:** I think -- I'm sorry?

4 **THE COURT:** So built in the applicable plan and  
5 received by the class members, is that what you say --

6 **MS. REYNOLDS:** Correct.

7 **THE COURT:** -- means those things?

8 **MS. REYNOLDS:** Yeah, the terms of the applicable plan  
9 would indicate, you know, the amount of co-insurance, any  
10 co-pay. There are different rates of coverage for in and out  
11 of network so those things are set forth in the plan.

12 And then, yes, the paragraph, the subparagraph after that  
13 where it says that it would be coverage for all services  
14 received by the class member at the requested level of care.

15 **THE COURT:** So let me just make sure why that doesn't  
16 include other reasons for denying.

17 I mean, it's just -- because it's otherwise forbidden  
18 under some section of this?

19 **MS. REYNOLDS:** Right. I mean, that's under C where  
20 it's talking about no retaliation that we talk about not  
21 denying on any other ground.

22 **THE COURT:** Well, but then --

23 **MS. REYNOLDS:** I mean, calculating the amount of a  
24 benefit is not the same thing as applying an exclusion or  
25 denying coverage. So if someone, you know, hadn't met their



1 deductible or something, that just goes into the calculation of  
2 what the benefit is.

3 **THE COURT:** Right.

4 **MS. ROMANO:** But, Your Honor, if I can be heard on  
5 that issue. It's not so simple or clear-cut, and let me just  
6 give you maybe a couple of examples.

7 If a member requests authorization for coverage at the  
8 preservice time, that is not a guarantee of benefits. That  
9 does not guarantee any benefits will be paid. In fact, letters  
10 going to members that authorize treatment say that. And  
11 there's many reasons why when the member eventually gets the  
12 services that the services would not be covered at all under  
13 the plan.

14 **THE COURT:** Okay. Well, so ignore that for the moment  
15 because I'm not buying that argument at all.

16 What I'm interested in is the things that I'm still going  
17 to let you do and to make sure you can still do them. For  
18 example, what we've been talking about is exactly that, to make  
19 sure that nobody looks at this order and says, "Well, I  
20 can't" -- I mean, you know it and I know it and we're looking  
21 at it and I guess we're the people who matter, but I would like  
22 the order to be a little clearer on what it means that you can  
23 deny -- I mean, I guess what you're saying is in D under  
24 retaliation it says specifically -- C, it says you can't deny a  
25 request on other than medical necessity except for exclusions

1 previously cited. You can't deny requests.

2 Well, so then I get what you're saying is that does not  
3 mean that you can't say, "Well, I'm going to only pay  
4 25 percent because that's what we pay for out of network."

5 **MS. REYNOLDS:** Correct.

6 **THE COURT:** Okay. I appreciate that's not what you  
7 meant but that is -- I mean, it's not an exclusion from  
8 coverage but it's a payment term. I'm just wondering how we  
9 capture it so that -- you know, and there will probably be more  
10 than one of those kinds of payment terms -- how we capture  
11 UBH's ability to do that sort of thing because I don't know  
12 what the waterfront is.

13 I mean, I understand the sort of exclusions from coverage:  
14 "We won't pay for someone who ultimately figured out is not  
15 certified in the area." Or "We won't pay for" -- those I  
16 think -- you know, I'm prepared to lay those at UBH's feet and  
17 they should have said them and they didn't, and I'm not going  
18 to get into them. But the payment, what's going to actually  
19 get paid based on the person's out-of-network or how much was  
20 left on the co-pay that year, or whatever it is, or whether  
21 they've reached their maximum, you know, that stuff seems to me  
22 of a different type.

23 **MS. REYNOLDS:** Your Honor --

24 **THE COURT:** Yeah.

25 **MS. REYNOLDS:** -- could we propose some additional

1 language? I think that it's probably something that can be  
2 clarified with a couple of additional sentences in that  
3 paragraph if it's approved.

4 **THE COURT:** Right. I'd also like you to propose a  
5 different language with respect to that they're only entitled  
6 to seek the benefits -- payment for the benefits that they  
7 actually applied for.

8 **MS. REYNOLDS:** Okay.

9 **THE COURT:** Okay. Yes, Ms. Romano.

10 **MS. ROMANO:** Yes. If I can present one example. If a  
11 member sought authorization for coverage in December and then  
12 got the treatment in January and was no longer covered under a  
13 plan that's administered by United in January. The claim comes  
14 in in January. The member is not covered under a plan  
15 administered by United at that point in time. That is a  
16 specific example of a situation where United should be entitled  
17 to exercise its discretion or, frankly, that's nondiscretionary  
18 under the plan. If the member is not covered, the member is  
19 not covered.

20 **THE COURT:** Yeah, but it didn't happen that way. It  
21 didn't happen that way because you wrongfully denied it in the  
22 first place, and so this person is left scrambling. And I  
23 don't know why it didn't come in January, February, or  
24 December. Maybe it didn't because you denied it.

25 But, in any event, I'm willing to lay that at the feet of

1 UBH. They're going to have to live with that. I don't think  
2 it's any kind of a windfall. I don't think it's any kind of a  
3 windfall any more than the usual rule that you can't raise in  
4 the litigation things you didn't raise in the administrative  
5 level in the first place. It's the same sort of thing. You  
6 had to identify what you were doing. This is a very similar  
7 sort of thing.

8       You couldn't -- if you had done it properly in the first  
9 place -- that's another reason why I don't want to get into it  
10 because I don't want you raising things like this that I think  
11 are maybe your fault that it's in January and not in December,  
12 but we'll never know because you turned it down and did it in  
13 the first place. I think that you have to live with the  
14 consequences and pay for the damage that's caused -- not pay  
15 for the damage that's caused, but allow reprocessing and grant  
16 claims where that's the circumstance. I mean, that's a  
17 circumstance where I'm not particularly troubled by it,  
18 frankly.

19       So let me just -- let's see, I don't think -- I have not  
20 seen any evidence of any plans that actually prohibit interest  
21 for wrongful denial of benefits and none of the examples  
22 provided by UBH do that. I'm highly inclined to include, as  
23 part of the instructions on reprocessing, to include interest  
24 on benefits that these people have now had to wait years and  
25 years for, and the only question in my mind is what interest

1 rate to be used.

2 Some of these plans have interest rates. Some of these  
3 plans don't maybe. Maybe they all have interest rates in some  
4 portion of the plans. I just don't know what the right  
5 interest rate is.

6 **MR. ABELSON:** Your Honor, if I may.

7 **THE COURT:** Yeah.

8 **MR. ABELSON:** On this we agree there's no plan that  
9 we've seen that UBH has pointed to that prohibits interest.  
10 We've also not seen and UBH has not pointed to any plan that  
11 sets a rate of interest -- that has a plan term regarding  
12 interest that is relevant here. So there's one, for example,  
13 related to if a -- in context clearly talking about interest  
14 charged by a provider because of late payment. UBH won't cover  
15 that. That's just not what we're talking about here.

16 So in the absence of evidence --

17 **THE COURT:** But weren't there some plans that I  
18 thought Ms. Romano put some in where there were times when  
19 interest would be paid and there was an interest term? Am I  
20 misremembering, or are there no plans that actually have any  
21 interest rates that they award?

22 **MR. ABELSON:** So there was one plan, it is Trial  
23 Exhibit 1542, a Gucci plan, that made a reference -- if I may  
24 just refresh myself on the specific terms.

25 It referred to if requests for payment were made that

1 included all required information which are not paid within the  
2 time frames, they are due overdue payment of simple interest at  
3 a rate of 12 percent. So in context, that seemed to clearly be  
4 referring to times when a claim was approved by UBH and paid --  
5 it was just paid late.

6 But this is not what we're talking about here. This was a  
7 wrongfully denied -- these are all wrongfully denied claims.  
8 So the default -- under the *Blankenship* case from the  
9 Ninth Circuit, Section 1961 is the applicable rate unless UBH  
10 can point to evidence to the contrary.

11 **THE COURT:** They might like that interest rate. It's  
12 about a quarter of a percent right now and likely to stay that  
13 way for the foreseeable future, rather than using something  
14 that they were going to pay on late payments of promised  
15 benefits. I don't know.

16 Do you have a view on this, Ms. Romano?

17 **MS. ROMANO:** Simply, Your Honor, the positions we  
18 included in our briefing, which is that there's no money  
19 judgment issuing so pre- or post-judgment interest isn't  
20 appropriate here and it should be done pursuant to the plan.

21 We also did identify one plan with language that we  
22 contend did support the argument that no interest would apply,  
23 but we understand Your Honor has reviewed that and has  
24 disagreed with that position.

25 **THE COURT:** Okay. So the injunction and then

1 reprocessing.

2 The injunction. My plan would be to issue an injunction  
3 and appoint a special master who would be a special master  
4 regarding compliance with my remedies order.

5 The injunction would prohibit the use of criteria for  
6 medical necessity obviously that deviate from the generally  
7 accepted standards of care, but I think I'm inclined to require  
8 the use of ASAM, LOCUS, and CASII, as well as -- to the extent  
9 not inconsistent with state law, and then the state-mandated  
10 criteria.

11 I would appoint a special master to, in addition to  
12 monitoring the reprocessing, oversee compliance with the  
13 injunctive relief, including monitoring the guidelines that are  
14 used by UBH to make necessity determinations, although I don't  
15 think I'm going to include in his duties other than the  
16 incidental. We may have to look at this, but he's not required  
17 to monitor their application of the guidelines to individual  
18 cases.

19 I don't think that's what this case is about. This is  
20 about the development of the guidelines. There may be some  
21 incidental need to see some of that just to make sure the  
22 guidelines mean what they say and are used in the proper way,  
23 that sort of thing, but I think the application of guidelines  
24 to individual cases or the application of the guidelines is  
25 really not the focus here. It is making sure the guidelines

1 that are used are consistent with generally accepted medical  
2 standards.

3 I would require the development of a training program  
4 under the supervision of the special master. And so I need --  
5 I have a series of questions that arise from this in addition  
6 to any comments you might want to make about those thoughts.

7 Why do I need to address future guidelines at all other  
8 than to say "Use these"? That's question number one.

9 Question number two is: What version of these am I going  
10 to be requiring that they use? The most recent version? I  
11 mean, it's an injunction so if it comes to the point where  
12 somebody thinks that this is not generally accepted standard of  
13 care because the people who write ASAM have gone off the rails,  
14 they're supposed to come back and see me. But that's my  
15 question about that, which version.

16 Then plaintiff made a minor -- made a change on the  
17 sentence that required -- it was IV.A.2, there was a sentence  
18 prohibiting guidelines that have substantively the same  
19 coverage criteria, and changed it in great detail, and I'd like  
20 some comments from UBH on whether or not that helps or there's  
21 any objections to that language other than obviously having  
22 that section in there at all.

23 I'm not inclined to order changes in business practices  
24 and corporate structure. First of all, I'm not sure I need it.  
25 And this is the question: If all I'm doing is ordering them to



1 instead of making their own guidelines use ASAM, LOCUS, and  
2 CASII, you know, that's the -- then why do I have to do that?  
3 If there's no creation of guidelines, then maybe we don't have  
4 to concern ourselves with that.

5 I'm also concerned that -- the concern at trial was a  
6 conflict of interest in creating guidelines. The evidence was  
7 that there were inappropriate financial considerations taken  
8 into consideration in designing the guidelines. I didn't  
9 really take evidence on all of the implications of having a  
10 particular corporate structure, and so I'm a little concerned  
11 about, with my very limited picture, ordering that kind of  
12 remedy.

13 One of the things that I would have to do -- and then the  
14 last question is: How long does the injunction last? Because  
15 I want this -- I don't know what the answer to that question  
16 is.

17 So that's my preliminary thoughts on the injunction. Why  
18 don't I hear from Ms. Romano first on that.

19 **MS. ROMANO:** Sure, Your Honor.

20 I think I will start, then, with the requirement to use  
21 the certain guidelines; and as has been briefed in the  
22 declarations as well, UBH is currently using the guidelines  
23 that plaintiffs did propose. I appreciate there's an issue  
24 with respect to ASAM levels and I suspect we'll be getting into  
25 that in a bit; but, you know, on its face, ASAM, LOCUS, and

1 CALOCUS, or CASII I guess is being used --

2 **THE COURT:** Right.

3 **MS. ROMANO:** -- so those are the guidelines being  
4 used. And the way I understand what Your Honor has just said  
5 is he would be inclined to order that those guidelines be used.

6 The issue of course that UBH has raised is its discretion  
7 to use guidelines that conform with the plan. It has no  
8 current intent to change the use of the guidelines that I just  
9 outlined. However, it should have discretion to be able to  
10 make those changes over time whether it be to add another  
11 guideline, like the AACAP guidelines, which were also offered  
12 into evidence and supported by the experts as being consistent  
13 with generally accepted standards of care, or to consider other  
14 guidelines, third-party guidelines or not third-party  
15 guidelines. So that is the issue there with respect to the  
16 guidelines.

17 **THE COURT:** Well, so I'm not sure what that means. So  
18 you're using these now because you have plans that have medical  
19 necessity terms and that they use these guidelines to determine  
20 what is the generally accepted standard of care consistent with  
21 the plans. So what are you envisioning in the future might  
22 happen?

23 **MS. ROMANO:** I'm actually not envisioning that  
24 anything might happen in that there is no intention to change  
25 that at all. The concern here is some perpetual injunctive

1 relief, and I appreciate Your Honor also asked about how long,  
2 but it is a concern with respect to the fact that there is  
3 discretion conferred to the administrator to administer the  
4 plans. There is not one sole standard of what's generally  
5 accepted standards of care and there should be some discretion  
6 conferred on UBH to use another set of guidelines if it desires  
7 at some point in time if it is consistent with the plan.

8 **THE COURT:** So you're not -- okay. I mean, obviously  
9 if a plan excises the generally accepted standard of care, then  
10 these guidelines don't apply anyways, but you're talking about  
11 development along the road that might cause some other -- well,  
12 okay. I mean, you know, part of that is you can come back to  
13 me and the other part is how long I think is a key piece of  
14 that. It's -- okay. I understand that issue. Go ahead.

15 **MS. ROMANO:** And with respect to the specific  
16 guidelines, just to make sure I have this accurate on the  
17 record, what UBH is using is the ASAM guidelines --

18 **THE COURT:** Right.

19 **MS. ROMANO:** -- and then LOCUS for adults --

20 **THE COURT:** Right.

21 **MS. ROMANO:** -- CASII for ages 6 through 18, and  
22 that's C-A-S-I-I --

23 **THE COURT:** Uh-huh.

24 **MS. ROMANO:** -- and then ECSII -- I'll call that  
25 ECSII, I don't know if that's the accurate way of pronouncing

1 it -- that's for very young children of 0 to 5.

2 **THE COURT:** Maybe I could get some insight from the  
3 plaintiffs on that, on ECSII, and what they think of it when we  
4 get to them.

5 Okay. Go ahead. I think -- did you have any other  
6 comments on -- I guess that was a really the main question.

7 **MS. ROMANO:** Your Honor, I actually did not get down  
8 fully the provision the Court was referring to with respect to  
9 I thought it was Section IV.A.2.

10 **THE COURT:** That's correct. It's IV.A.2. Let me get  
11 it in front of me too so we can take a look at it together.

12 **MS. REYNOLDS:** And this is from the version that was  
13 attached to plaintiffs' latest reply, so it's the --

14 **THE COURT:** Yeah. It's the latest version that they  
15 put forth --

16 **MS. ROMANO:** Which is the date of this one or the --  
17 I'm worried that it may not match what I have in front of me.

18 **THE COURT:** Right. Well, you'll know because it's a  
19 very different provision. The one that they're -- they changed  
20 IV.A.2 from being one short sentence to being a very long  
21 sentence.

22 **MS. ROMANO:** Yes, I do see. It's the redlined  
23 version?

24 **THE COURT:** Yes.

25 **MS. ROMANO:** Yes, it did address some of the issues

1 that defendants had with respect to the prospective injunctive  
2 relief, but not all of them; and specifically the phrase  
3 "regardless of whether any such criterion is expressed in  
4 facially different language" --

5 **THE COURT:** Yes.

6 **MS. ROMANO:** -- "except that UBH is not enjoined from  
7 various other provisions" --

8 **THE COURT:** Right.

9 **MS. ROMANO:** -- and that is overly vague.

10 And, in addition, more broadly, there are some situations  
11 where this prospective injunctive relief would bar or preclude  
12 provisions that experts testified, including plaintiffs'  
13 experts testified, were consistent with generally accepted  
14 standards of care at trial.

15 **THE COURT:** Well, okay.

16 **MS. REYNOLDS:** Your Honor --

17 **THE COURT:** Yes.

18 **MS. REYNOLDS:** -- if I may jump in.

19 I mean, the goal here was to reflect the Court's findings  
20 that all of the claims -- all of the criteria that were listed  
21 on the plaintiffs' claims chart were inconsistent with  
22 generally accepted standards of care except for these very few  
23 criteria that the Court found that that hadn't been proven. So  
24 those are the only ones that the Court made a finding that  
25 those specific provisions of those common criteria in those

1 years were acceptable. So that's why it's written in this way.

2 **THE COURT:** No, I appreciate that.

3 So what is the example, Ms. Romano, of something that I  
4 either didn't make a finding on or I found was consistent with  
5 generally accepted standards of care that would be prohibited  
6 by this description?

7 **MS. ROMANO:** Yeah. So there is a provision in the  
8 guidelines relating to co-occurring conditions, and in the  
9 guidelines it referred to ensuring that it was safe to treat  
10 co-occurring conditions at a level of care. And the Court  
11 found that to be inconsistent with generally accepted standards  
12 of care because it did not also reference that it would be  
13 effective, safe and effective.

14 **THE COURT:** Right.

15 **MS. ROMANO:** Under this proposed injunctive relief, if  
16 UBH uses a guideline that speaks about the safety of treating  
17 co-occurring conditions, that would be barred. And, in fact,  
18 the evidence is that, yes, safety is something to be considered  
19 with respect to co-occurring conditions but so is  
20 effectiveness.

21 **THE COURT:** Uh-huh. Ms. Reynolds [sic], I'm not  
22 entirely sure I understood that. So what you're saying is that  
23 because I found safety standing alone without also coupling it  
24 to effectiveness violated generally accepted standards of  
25 care -- well, I guess I don't understand what you're talking

1 about because this just says you can't use the criteria that  
2 you used before that I found violate the standard of care.

3 **MS. ROMANO:** We have understood it to say both you  
4 can't use the criteria you used before but you also can't use  
5 something that is expressed in facially different ways.

6 And so the criteria I was just suggesting relating to  
7 co-occurring conditions and whether it's effective -- excuse  
8 me -- safe, you could have a facially different way of saying  
9 that in a different guideline and that would be precluded under  
10 this paragraph even though safety is something that should be  
11 considered with respect to the services.

12 **THE COURT:** Well, what it says is you can't use what  
13 you used before and you can't use what you used before by  
14 changing language. That's what it says.

15 Okay. I understand the concern, though. I understand the  
16 concern, though.

17 So I'm being reminded to try to pin you-all down on the  
18 question of whether or not -- I mean, these are a couple of  
19 questions. First is, the declaratory relief, I'm still -- is  
20 it prospective? Is it retrospective? Is it both? And is  
21 it -- if it is one or the other, should it be considered  
22 mandatory or not mandatory, or should people be allowed to opt  
23 out of any portion of the dec. relief that's requested by the  
24 plaintiff because of its prospective or retrospective views --  
25 impact? That's the question.

1           **MS. REYNOLDS:** Your Honor, if I --

2           **THE COURT:** Yes. Sure.

3           **MS. REYNOLDS:** -- can jump in first, I guess.

4           We've argued that the declaratory relief is -- that it is  
5 forward looking. The idea of entering into a declaratory  
6 judgment is to put in the form of a judgment the Court's, you  
7 know, interpretation of these key plan terms, like what does  
8 the "generally accepted standards of care" term mean, and to  
9 lay out other important findings from the findings of fact that  
10 make clear, for example, that UBH has a history of biased  
11 claims administration, which will be important in the future.

12           So in that sense, the Court is memorializing its findings  
13 in the form of a judgment, but that judgment is meant to carry  
14 through to the future and govern the parties' interactions in  
15 that sense, and so it's pretty standard declaratory relief.

16           In terms of whether it's mandatory or not, I mean, you  
17 know, plaintiffs' position is that the Court -- you know, in  
18 the sense that it applies to all of the class members equally,  
19 then it is mandatory. We don't think that opt-outs are  
20 prohibited but if the Court were to have a (b)(1)/(b)(2) class  
21 that didn't have opt-outs, so we think it's perfectly  
22 appropriate to enter the declaratory relief there.

23           **THE COURT:** Okay.

24           Ms. Romano, did you want to speak to that?

25           **MS. ROMANO:** Yes. With respect to declaratory relief,



1 it must be a declaration of future rights or it's not  
2 appropriate declaratory relief. Numerous cases we cited in the  
3 briefing, but the purpose of declaratory relief is to set  
4 controversies at rest before because harm -- not to remedy  
5 harms that have already occurred. So --

6 **THE COURT:** But that makes no sense. I mean, you get  
7 to declaratory judgment questions about whether conduct in the  
8 past violated a particular standard, and that's a perfectly  
9 appropriate declaratory relief. You get it in patent cases all  
10 the time. You know, and so I don't -- you know, I don't know  
11 that it makes sense that it has to be strictly just -- so you  
12 can't have a declaratory relief that says UBH violated their  
13 duties under the plans in the past? I can't say that in a  
14 declaratory relief?

15 **MS. ROMANO:** It would be our position that that is not  
16 appropriate for a declaratory relief. They are conclusions of  
17 law or findings of fact that the Court has issued, but that it  
18 would not be appropriately part of declaratory relief.

19 **THE COURT:** Okay. Got it.

20 All right. Yes, go ahead.

21 **MS. ROMANO:** Can I back up to one additional issue on  
22 injunctive relief if I may?

23 **THE COURT:** Yes. Back up.

24 **MS. ROMANO:** We wanted to also be clear with respect  
25 to the prospective injunctive relief relating to the use of

1 certain guidelines that it not preclude administration of plans  
2 that specify other guidelines.

3 So, for example, in New York LOCADTR Guidelines apply.  
4 There may be plans now or in the future that specifically say  
5 LOCADTR -- and it's L-O-C-A-D-T-R, I believe -- that if a plan  
6 says "Use LOCADTR to determine medical necessity," that UBH  
7 should not be precluded from applying the guidelines that are  
8 identified in the plan.

9 **THE COURT:** Okay.

10 **MS. REYNOLDS:** And, Your Honor, could the plaintiffs  
11 be heard on the injunctive relief issues that you raised?

12 **THE COURT:** No. You're next. I wanted you to talk  
13 about the injunctive relief issues and take what Ms. Romano was  
14 talking about. I'm particularly interested in that last issue  
15 and the ECSII plan.

16 **MS. REYNOLDS:** ECSII.

17 **THE COURT:** Right.

18 **MS. REYNOLDS:** And I'm going to turn it over to  
19 Mr. Cowart to respond on those issues.

20 **MR. COWART:** Thank you, Your Honor.

21 So, first, when it comes to prospective remedies, you  
22 know, I think it's important to make an observation about what  
23 we're trying to remedy, which is breaches of fiduciary duty.

24 And the remedies that we've proposed, they work in concert  
25 with one another. So as we start talking about individual

1 prospective remedies, you know, what I keep wondering in  
2 listening to the dialogue is: I can answer that question if I  
3 knew what you were going to do on the rest of the prospective  
4 remedies. So let me give you an example of that.

5 When it comes to the go forward trying to tie United's  
6 hands on what guidelines -- what they're not allowed to use, I  
7 think Your Honor made the observation, which is right, that if  
8 Your Honor just orders them to use specified guidelines, it  
9 obviates in many ways to prohibit them from using other  
10 guidelines because it's implicit in what you've done. So  
11 plaintiffs take that and at a theoretical level we don't  
12 disagree with that.

13 But the one remedy that it sounds like you're not inclined  
14 to grant is the corporate structural reforms and if I  
15 understood correctly, the rationale that was leading you into  
16 that direction was that, essentially, what's the point. These  
17 committees aren't going to be doing anything and, therefore,  
18 they're not going to be drafting guidelines so who cares  
19 whether they know something about finance or not.

20 And I guess on one level I'd respond to that and say,  
21 well, if that's the case, then these committees won't exist  
22 and, hence, that part of the injunction is largely a nullity.

23 But our concern is that these committees are going to  
24 continue to exist, and I would point to the battle that you see  
25 in the briefing over what is UBH doing with ASAM today, what's

1 happening. And we have some anecdotal evidence about that. We  
2 certainly haven't been able to engage in any discovery, but it  
3 seems to us that what is happening is that UBH is saying to the  
4 world they are using ASAM but that they are, in fact, not, that  
5 they are manipulating it in ways that are somewhat opaque to us  
6 but they are not actually doing it.

7 And so, again, to harken back to where I began, the point  
8 for us is we're trying to remedy what we see as the most  
9 egregious breach of fiduciary duty in the health insurance  
10 context, you know, arguably in history, at least when it comes  
11 to coverage, whether there's coverage or not. There have been  
12 other scandals that related to how much people get paid, but  
13 this is probably the most egregious one when it comes to  
14 coverage decisions. And so each of these remedies, these  
15 go-forward remedies, the corporate structure reform, I would  
16 sort of try to put it back on UBH and say it this way: What is  
17 the -- you know, *MetLife* makes it very clear that having these  
18 kinds of firewalls is what a faithful fiduciary would do and  
19 the statute, ERISA, makes it very clear that UBH has a duty of  
20 loyalty.

21 So I guess my reaction to this is: It was that failure  
22 that caused what happened or at least led to what happened. I  
23 mean, the Court saw the evidence -- the ASAM story, the  
24 manipulations, the Finance Department making decisions -- and  
25 to us it is just such a natural remedy to exactly what we

1 proved at trial. That was the genesis in many ways of the  
2 illegality and, hence, that should be central to the Court's  
3 remedial regime or at least a part of it.

4 **THE COURT:** Do you want to answer my questions?

5 **MR. COWART:** Sorry, Your Honor.

6 On the guideline that you mentioned, I want to pass the  
7 baton back to Caroline. I'm sorry.

8 **THE COURT:** Okay.

9 **MS. REYNOLDS:** The plaintiffs have no objection to UBH  
10 using ECSII, assuming I'm pronouncing that correctly.

11 **THE COURT:** It's E-C?

12 **MS. REYNOLDS:** E-C-S-I-I. It's early childhood --

13 **THE COURT:** Yeah. ECSII probably.

14 **MS. REYNOLDS:** Oh, did I --

15 **THE COURT:** E-C-S-I-I.

16 **MR. COWART:** I believe it's pronounced ECSII.

17 **THE COURT:** Oh, ECSII. That's how the moniker is  
18 pronounced.

19 But which -- so let me -- there are two things I want you  
20 to address from the plaintiffs' perspective. One is: Which  
21 versions of these? Right? There's a version that was  
22 yesterday, there's a version that's today, and there's a  
23 version that's tomorrow.

24 **MS. REYNOLDS:** I mean, we think the Court should order  
25 UBH to use the most current version. It makes the most sense

1 to use whatever is in effect at the time rather than sort of  
2 freezing it. They do get updated from time to time but it's  
3 not that different.

4 **THE COURT:** Ms. Romano, do you have -- I take it you  
5 have no problem with ECSII, since you're using, it being added?

6 **MS. ROMANO:** That's correct, Your Honor, and our  
7 client is using the current versions of those guidelines that I  
8 had conveyed earlier.

9 **THE COURT:** Okay.

10 Okay. Ms. Reynolds, what about Ms. Romano's points that  
11 things change and that we shouldn't prohibit them from  
12 developing other guidelines, as time goes on we're using other  
13 guidelines other than these, if they are consistent with  
14 generally accepted standards of care?

15 **MS. REYNOLDS:** Well, Your Honor, I think the evidence  
16 at trial showed that generally accepted standards of care form  
17 over a long period of time and they're not rapidly changing;  
18 but if at some future point UBH believes that these criteria  
19 are no longer consistent with generally accepted standards, it  
20 can certainly return to the court.

21 Our concern with leaving it open to UBH to simply use any  
22 other criteria that they want is that it really opens the door  
23 to exactly the kind of problem where you see UBH using or maybe  
24 paying lip service to TDI criteria but using their own  
25 descriptive criteria alongside.

1 And, you know, Ms. Romano's reference to third-party  
2 criteria was especially troubling because some of the  
3 third-party criteria out there are extremely restrictive; and  
4 the mere fact that it's a third-party creating them and selling  
5 them that's not, you know, a physician specialty association  
6 that's doing it to aid in the practice of patients but, rather,  
7 it's a company that's selling it for utilization management  
8 purposes, I mean, that would completely undermine the  
9 effectiveness of the Court's order.

10 So we do think the order should be permanent, and if --

11 **THE COURT:** Permanent? Forever.

12 **MS. REYNOLDS:** -- UBH wants to seek relief after that,  
13 they can come back to the Court.

14 **THE COURT:** Forever. A 50-year injunction. Is that  
15 really what you want? That's quite a reach.

16 **MS. REYNOLDS:** Well, I think that it makes sense for  
17 them to be able to come back to the court. That's always  
18 within --

19 **THE COURT:** Oh, they can always come back to the court  
20 but, you know, we have a certain problem at a certain point in  
21 time with respect to certain standards. We're remedying that.  
22 I don't like keeping people under court supervision for an  
23 indefinite period of time. I don't like it.

24 You know, the first injunction that I ever had to  
25 supervise I inherited and it was, you know, 40 years old and it

1 was like talking apples and oranges when you looked at the  
2 situation 40 years later. And I also think that, you know,  
3 judges should be circumspect about these things even when they  
4 exercise this kind of authority.

5 **MS. REYNOLDS:** Let me turn it to Jason who had  
6 something to say.

7 **THE COURT:** Yes. Go ahead.

8 **MR. COWART:** Your Honor, you know, again we take the  
9 Court's point. I think for us there is potentially a middle  
10 ground here, which is some number of years, perhaps five years,  
11 an injunction that will last five years, at which point the  
12 parties can go back into court along with the special master,  
13 and UBH can explain why they reformed their ways and they  
14 should now be trusted perhaps to develop their own guidelines  
15 or whatever else; and we can say whatever -- you know, to the  
16 extent that we have anything that might be helpful to the Court  
17 and the special master presumably at that point could be very  
18 helpful to the Court, and the Court can decide at that point  
19 whether to extend the injunction, change it.

20 And to circle back to something we were talking about a  
21 moment ago. For example, if the Court were to order the use of  
22 specified guidelines for a period again, let's say, of five  
23 years, that does somewhat render, you know, committees like the  
24 BPAC committee somewhat meaningless perhaps. And so I could  
25 imagine an injunctive regime that essentially ties UBH's hands



1 for a number of years; and then perhaps upon a good enough  
2 showing says, "Okay. Maybe you have reformed your ways. I'm  
3 going to let you, you know, develop your own guidelines or say  
4 some choices about guidelines, but you're going to do that with  
5 a firewall," the kind of *MetLife* firewall that the  
6 Supreme Court has talked about.

7 Again, it's that holistic -- I guess where I'd ask you  
8 just to think about issues, think about each of these  
9 injunctions, is that when we -- and, admittedly, we sought a  
10 fulsome panoply of injunctive relief that we thought if all  
11 ordered, you know, completely would accomplish what we think  
12 needs to be accomplished.

13 There may be a lesser way to accomplish that, but we would  
14 ask you just to bear in mind how these different pieces fit  
15 together. Training matters a lot, matters whatever guidelines  
16 they're using. The corporate governance reforms to your point,  
17 maybe those matter more if and when UBH proves that it's able  
18 to make -- that it should be able to make some of its own  
19 guideline-related decisions.

20 **THE COURT:** You know, I just -- I'm not quite sure how  
21 that works so walk me through it again. You do it -- you have  
22 a target date or you don't have a target date?

23 **MR. COWART:** Sure. Sure. You say "Five" -- you know,  
24 let's imagine it's today. You say "Five years from  
25 September 2nd, for the next five years you're going to use

1 these criteria and you don't need a BPAC because you're just  
2 using these criteria. And at the conclusion of that five years  
3 you're going to come back and I'm going to get a report from  
4 the special master and the plaintiffs and UBH, and then, you  
5 know, I'm going to make a decision at that point whether I  
6 should continue to tie UBH's hands vis-a-vis the use of these  
7 specified criteria or if I should open it up a bit more."

8 **THE COURT:** Hmm.

9 **MR. COWART:** I mean, you know, again we take the point  
10 that permanent is a long time and the world -- you know, 100  
11 years from now there's no doubt the world is going to look  
12 totally different. You know, even as I'm saying it, I put out  
13 there five years but, to be honest with you, this misconduct --  
14 we can go back to the actual evidence of the trial -- right? --  
15 which is what all these remedies are supposed to be reflecting.  
16 The evidence at trial was for the better part of a decade UBH  
17 knowingly and intentionally, I mean, I can't come up with  
18 better adjectives and adverbs, but they egregiously breached  
19 their duties. They completely -- it's not like they ignored  
20 their fiduciary duties; they just didn't care about them.

21 And in light of that track record, five years, to be  
22 honest with you, probably isn't long enough. Maybe it ought to  
23 be ten. In the end it's your discretion but, you know, I think  
24 it's got to be a long time before UBH gets the power again to  
25 on its own, without anybody watching, make decisions about what

1 generally accepted standards look like.

2 **THE COURT:** So, Ms. Romano, I'd like you to talk about  
3 length of time.

4 I can't hear you. There you go.

5 **MS. ROMANO:** Excuse me.

6 Certainly not forever. It would not be appropriate to  
7 issue an injunction that lasted forever and any injunction  
8 relating to the guidelines that should be used should include  
9 an ability to come into the court and address potential  
10 changes, and we understand Your Honor has recognized that as  
11 well.

12 UBH would argue that five years is a very long time and  
13 the evidence would not support five years but doesn't have a  
14 position on a specific time that would be reasonable.

15 **THE COURT:** Okay. That's very trusting of you.

16 Reprocessing. Okay. So the first set of questions I had  
17 we already talked about, and you're going to try to give me  
18 some better language that allows them to pay only  
19 out-of-network amounts for an out-of-network provider or, you  
20 know, pay only the -- if there's a cap on how much they pay for  
21 a particular benefit or whatever the plans are.

22 So on assignees, the proposed order envisions that the  
23 benefit would be paid to the class member or the class member's  
24 assignee. How do you envision that coming to light and being  
25 handled?

1           **MS. REYNOLDS:** So really what's at issue here is  
2     directions to pay. So when someone seeks coverage or seeks  
3     medical services, a lot of times you sign something that says  
4     "I authorize you to submit my insurance claim on my behalf and  
5     to receive the payment." That's a direction to pay. It gets  
6     submitted to the insurance company that way, and the insurance  
7     company has its own, you know, forms and things that get filled  
8     out and then the provider receives the payment. This happens  
9     all the time. UBH already does this all the time with  
10    providers.

11           And what we expect is that if someone submitted an  
12    authorization with a direction to pay, that that would then --  
13    that the direction to pay, if it's effective, would be honored  
14    as usual. If a claim was submitted without a direction to pay  
15    or if someone paid out of pocket themselves, then there's no  
16    issue of a direction to pay.

17           There's no evidence in the record about any assignments  
18    that are an assignment of an actual claim where someone else  
19    stands in the shoes of the person, and so we don't think that  
20    the -- but if there is one, UBH has to approve it. The  
21    evidence is that its plans, by and large, prohibit assignments;  
22    but if the plan allows it, then UBH approves the assignment.  
23    Again, it would have a record of the fact that it approved the  
24    assignment, and we have no problem with that being honored if  
25    there is, in fact, something on their --

1           **THE COURT:** Well, but what we're talking about is  
2 denied claims, though. So they didn't -- claims were denied  
3 and the person went out and got the services and somehow  
4 somebody paid for them, like -- you know, I don't know.  
5 Whoever it was. Maybe it was another secondary insurance  
6 carrier or it was something like that. You know, it's -- I  
7 mean, I know the way my insurance works. At some point I have  
8 secondary insurance and I have primary insurance just because  
9 I'm old, and there might be a direction to pay that they don't  
10 have because UBH denied the claim and somebody else paid for  
11 it, but that somebody else might be entitled to whatever this  
12 benefit is. So I'm wondering what do you do about that.

13           **MS. REYNOLDS:** I mean, I think what the Court is  
14 positing is that a class member might have a contractual  
15 obligation to turn the money over to someone else, and --

16           **THE COURT:** I don't know. I don't know what form it  
17 takes. That's why I said it so vaguely.

18           **MS. REYNOLDS:** I mean, I think the problem is that  
19 there isn't any evidence in the record about this, and the  
20 evidence is if someone -- I mean, if in reprocessing someone's  
21 gone out of pocket, they're going to submit the evidence of  
22 what they paid --

23           **THE COURT:** Uh-huh.

24           **MS. REYNOLDS:** -- and the benefit will be calculated,  
25 and I think at that time the benefits are paid to the member.

1 And if they owe some contractual obligation to repay someone  
2 else, like their doctor or another insurance company, I think  
3 that's the class member's job to follow through on that.

4 **THE COURT:** So what did you envision when you put in,  
5 in the proposed order -- let me just get it in front of me.

6 **MS. REYNOLDS:** "Or their assignees"?

7 **THE COURT:** Yeah, "or their assignees."

8 **MS. REYNOLDS:** Right. Well, UBH was saying that it  
9 has -- that assignments are an issue, and we proposed that only  
10 if there's an assignment in their records that they've  
11 already -- that UBH has already accepted, that's the -- the  
12 evidence is that if someone wants to have an assignment, UBH  
13 has to approve it before it's effective. So if UBH has done  
14 that, then we're perfectly fine with them honoring that  
15 assignment; but if there's no evidence of that, I think, you  
16 know, the payment would go to the member.

17 Mr. Cowart, do you want to step in?

18 **MR. COWART:** Yes. Sorry. Sorry, Your Honor. If I  
19 can just jump in on this.

20 You know, again, the animating idea of reprocessing is  
21 putting class members or these ERISA beneficiaries back in the  
22 position they would have been but for the breach.

23 **THE COURT:** Uh-huh.

24 **MR. COWART:** And so to the extent we have a pending  
25 claim that was pending in front of UBH, it had made all the

1 prior decisions about it, you know, all the administrative  
2 reasons that might be able to guide it, this person is  
3 literally on the 1 inch line, the only thing that's left to  
4 have happen is the GASC determinations -- sorry, general  
5 accepted standards of care -- we've been in this litigation too  
6 long -- that decision was made improperly and then there was  
7 the subsequent "how much money do we have to pay" decision,  
8 which we talked about all day, and now we're just in the last  
9 thing that never happened, which is the benefit payment.

10 But, again, I walk you through that just to remind the  
11 Court that in the end we're trying to put these people back in  
12 the position they would have been in. And so the point here on  
13 who to pay is our default position is UBH should pay whoever it  
14 would have paid had it paid the claim in the first instance.  
15 That's just sort of the animating notion of what we drafted.  
16 We may not have drafted it in the best language possible but  
17 that was the idea.

18 **THE COURT:** Okay. Ms. Romano, do you have a problem  
19 with the language "or the class member's assignee" in this  
20 order?

21 **MS. ROMANO:** Yes, we do, Your Honor. The members of  
22 the class are members of the health plans. They are not the  
23 providers or other third-party insurance companies. They are  
24 the members of the health plan. So those are the folks that  
25 would be and could be entitled to reprocessing or relief in

1 this case.

2 The fact is that the plans vary in terms of what they  
3 permit with respect to assignment or what they require with  
4 respect to assignment. There are named plaintiffs in the case  
5 whose assignment provisions do not require some sort of  
6 preapproval as suggested. It really varies in terms of whether  
7 or not UBH would have an evidence or record of assignment.  
8 That's particularly the case for the situation where it was  
9 just a preservice request for coverage, no claim has come in.  
10 There would be in most cases no record of any assignment  
11 particularly in that situation.

12 So to include in the order that reprocessing still occurs  
13 when the only payment that would be made through reprocessing  
14 should go to a provider is not appropriate. The providers are  
15 not members of the class. Some of them have their own cases  
16 pending right now. They did not have notice or right to opt  
17 out with respect to the reprocessing here, and that is one of  
18 the reasons for UBH's proposal in the briefing of some sort of  
19 notice that goes out to class members with a "check-the-box,"  
20 "did you pay," "did you assign it" type of request to identify  
21 who is entitled to reprocessing and who can benefit from  
22 reprocessing among the members of the class.

23 **THE COURT:** Yeah. I'm not going to do that. That  
24 will just mean that there will be no reprocessing.

25 The question for you is whether or not you want this order



1 to say you pay to the class members or it gives you more  
2 flexibility on who to pay. That's the question. If UBH  
3 doesn't want the flexibility to pay anyone other than the class  
4 members, I guess that's okay.

5 **MS. ROMANO:** UBH should be able to exercise its  
6 discretion conferred under the plan to administer the benefits,  
7 and that would include assessing a situation like an  
8 assignment.

9 **THE COURT:** So how would you capture that instead of  
10 saying "UBH shall pay to the class member or the class member's  
11 assignee"? How would you figure out -- what would you say?  
12 What language would you suggest in that regard?

13 **MS. ROMANO:** I'd like to consult with our client in  
14 terms of the language they would use with respect to processing  
15 claims and then propose that back to the plaintiffs and the  
16 Court.

17 **THE COURT:** Okay. Great. That will be very helpful.  
18 Thank you.

19 Where were we?

20 (Pause in proceedings.)

21 **THE COURT:** Here's an interesting question. No, I'm  
22 not going to do that.

23 I mean, I wrestle a little bit with whether or not I  
24 should let people at some point opt out of the reprocessing  
25 process again because it can be an annoying process. I mean,

1 you know, these people have gone through a lot and most of  
2 which doesn't have to do with the payment or nonpayment of  
3 their claim, and they may or may not want to be bothered by  
4 whatever correspondence, et cetera, happens when there's a  
5 reprocessing and tells them they can submit additional records,  
6 et cetera, et cetera. I mean, these are people who, you know,  
7 if they're like some of the named plaintiffs in these classes  
8 caring for their extremely challenged children for a long  
9 period of time, they've got a lot going on and they may or may  
10 not be really interested in this whole bit.

11 They had an opportunity to opt out and maybe that's  
12 enough, and I probably am satisfied that that's enough, but I  
13 sometimes wrestle with maybe there's some point in this process  
14 where we should tell people if they want to just stop the  
15 process of reprocessing, they can stop the process of  
16 reprocessing. I don't know if anyone has any thoughts about  
17 that.

18 **MR. COWART:** Your Honor, this is Jason Cowart. Pardon  
19 me for jumping in, but you offered the floor.

20 **THE COURT:** Sure.

21 **MR. COWART:** You know, I think plaintiffs' reaction to  
22 that is -- I mean, I share the -- I think in the main class  
23 members, especially if reprocessing is they're ordered to do it  
24 and the class members in general don't have to be involved, I  
25 think that kind of accomplishes the Court's objective of not

1 adding to these people's burden. If they're asked to submit  
2 additional information, they can obviously decide not to if  
3 they want.

4 But I think the plaintiffs would not oppose some mechanism  
5 by which class members can communicate that they don't want  
6 their claim to be reprocessed for some reason. I mean, you  
7 know, in the end -- you know, in the end reprocessing is  
8 designed to provide class members with a remedy and if the  
9 class members don't, you know, want it, you know, I don't know  
10 that we have kind of a philosophical or theoretical objection  
11 to some mechanism like that.

12 **THE COURT:** Yes?

13 **MS. ROMANO:** Your Honor, if I can comment on this  
14 issue as well.

15 It would be improper to permit them to opt out of the  
16 class such that they could then pursue other claims. There  
17 would be no preclusion *res judicata* from this case and that  
18 could be one way to --

19 **THE COURT:** I agree. I agree.

20 **MS. ROMANO:** Okay.

21 **THE COURT:** I'm not -- what I'm talking about is that  
22 they can give an instruction to "Please don't reprocess my  
23 claim," something like that.

24 **MR. COWART:** But just to be clear, we would oppose  
25 vehemently any suggestion the class members have to opt

1 themselves into the reprocessing.

2 **THE COURT:** No, I'm not doing that.

3 **MR. COWART:** Thank you, Your Honor.

4 **MS. ROMANO:** So if individuals -- well, I guess,  
5 Your Honor, this goes to whether notice is going out to  
6 individuals at all. I know that each side had different  
7 proposals with respect to notice so it doesn't seem like there  
8 would be -- I guess it will depend, Your Honor, on whether  
9 there is going to be some notice going out to members at all.  
10 If there were, would it be okay if some individuals said, "No,  
11 thank you" on reprocessing but still continued to be bound by  
12 all of the issues in the case and decisions in the case, that  
13 would probably be okay but I think it depends on whether notice  
14 is going out at all.

15 **THE COURT:** Okay. Time for reprocessing. That's the  
16 last thing on my list. So I'm happy to talk about whatever  
17 else you'd like to talk about, but that's the last thing on my  
18 list.

19 I mean, I guess it's -- I've taken long enough to get this  
20 hearing together that the state regulatory approvals have  
21 probably already gone through, but I want to figure out a  
22 reasonable time period. You know, I envision there being, you  
23 know, monthly reports of progress to the special master on it  
24 or something like that, but what's a reasonable time period to  
25 accomplish 60,000 reprocessings? Whatever the number,

1 60-something thousand reprocessings. What I'm thinking about  
2 is a year with at least quarterly reports, maybe more often, to  
3 the special master on progress.

4 **MS. ROMANO:** Your Honor, can I ask a question about  
5 that?

6 **THE COURT:** Yeah.

7 **MS. ROMANO:** The way that plaintiffs had proposed the  
8 time frame, which was far shorter, but it was giving the class  
9 members a particular amount of time to submit new information  
10 and then 90 days after that to complete the reprocessing. And  
11 so while it had an outside range I think of nine months, it was  
12 a 90-day period from the moment additional information needed  
13 to be submitted up to the time of decisions, which was a very  
14 short time.

15 So when Your Honor speaks of a year, I'm curious how the  
16 other aspects of a reprocessing order, which we have not spoken  
17 about yet today, would interplay with that.

18 **THE COURT:** Yeah, that's a very good question. Let me  
19 get it in front of me so I can...

20 So the class members can submit things within 90 days of  
21 the class notice. That's the proposal by the plaintiffs. And  
22 then they had a period of time to complete the review of up to  
23 another total of six months, I think, on top of that.

24 I guess I hadn't thought about this in that level of  
25 detail, but I think what I was thinking about is completing the

1 whole process in a year. So if it's 90 days to complete the  
2 administrative record, then it's another nine months to  
3 complete the reprocessing.

4 Any thoughts on that?

5 **MS. ROMANO:** Can I ask another question, Your Honor?

6 **THE COURT:** Oh, good. Yes.

7 **MS. ROMANO:** When we're speaking about reprocessing,  
8 is it the Court's intent to be ordering reprocessing for all  
9 67,000? I guess there will be some that are reduced out  
10 because of the appeals issues perhaps or some other categories.

11 **THE COURT:** Still pretty close to that number, yes.  
12 That's what I'm thinking about. For purposes of this analysis,  
13 how long, you should assume that.

14 **MS. ROMANO:** And that would include people who didn't  
15 receive any of the services?

16 **THE COURT:** Well, yeah. We don't know that yet,  
17 though, and I'm not going to make people make a claim. Because  
18 I think if we do make them make a claim, that we will have a  
19 tiny little group who are willing to go through the process of  
20 even making the claim, and I don't want the -- I don't think  
21 that's appropriate.

22 So the question is: You're going to do 60-something  
23 thousand. Can you do it in nine months?

24 **MS. ROMANO:** I don't believe so, Your Honor. As we  
25 set forth in the papers, it's over 8,000 full-time equivalent

1 days to complete. I would certainly want to work with our  
2 client to identify the who. These are clinicians --

3 **THE COURT:** Sure.

4 **MS. ROMANO:** -- that would need to be identified for  
5 this. Resources at the company at least are not currently  
6 available because they have the other types of reviews they do  
7 of this sort. So if we could have some time to confer with our  
8 client to work through what that process would be understanding  
9 the scope issues that we've just discussed, we would appreciate  
10 that.

11 **MS. REYNOLDS:** And --

12 **THE COURT:** Ms. Reynolds, yeah.

13 **MS. REYNOLDS:** -- Your Honor, plaintiffs have  
14 obviously proposed a shorter period of time, and one of the  
15 things we're really mindful of is that these class members have  
16 been waiting a really long time for a remedy, some of them nine  
17 years. They're eager to get their claims reprocessed and bring  
18 this to a conclusion for them.

19 We think that, you know, UBH and its parent company,  
20 they've just announced record-breaking profits. They're  
21 certainly in a position to hire people to assist with this  
22 process. That's happened before, for example, in the *UNUM*  
23 regulatory settlement where they reassessed over 200,000  
24 claims, they created a division specifically for the  
25 reassessments.

1           So they can be required to staff up, essentially, to get  
2           this done, and we think that the Court's proposal of a year is  
3           generous. We don't think additional time will be appropriate  
4           and we think that if there's some problem with getting it done,  
5           that's why there's a special master to assist in identifying  
6           that this just isn't possible and it can be revisited at that  
7           time.

8           But I think on the front end, you know, we think the Court  
9           should put a deadline in place, we think it should not be  
10          overly long, and the Court should require UBH to get to it.

11          **THE COURT:** What else should we talk about?

12          **MR. ABELSON:** Your Honor, if I may, right before the  
13          last break you were addressing with Ms. Ross the appeal  
14          denials, and I just wonder if I could have one minute to  
15          respond to some items if you're ready.

16          **THE COURT:** Okay. Sure.

17          **MR. ABELSON:** So these are the folks who were denied  
18          administratively initially and then on appeal were denied under  
19          the guidelines so they're class members. Just a few quick  
20          points.

21          First of all, I think it's now undisputed that the notice  
22          was the best notice practicable and that there's no due process  
23          violation. And, in fact, the folks who have contacted us,  
24          these are people who are such people and they want to remain in  
25          the class. They don't want to be kicked out.



1           And then the due process analysis is really a preclusion  
2 analysis and in the event there are people who are such appeal  
3 guideline denials only and are unlike the people who have  
4 contacted us and don't want to be bound, they could raise in  
5 such case that they think the notice -- that their due process  
6 rights were not protected and that they should have gotten  
7 notice and that they shouldn't be bound. And that happens all  
8 the time, that happens with some frequency that courts will  
9 look at this and say, "Okay. You didn't get the notice. I'm  
10 not going to hold you bound."

11           And so we think they should be included -- these people  
12 should be included in the reprocessing. UBH says that it's  
13 going to be difficult to identify who they are. Ms. Ross said  
14 that this would require a page-by-page review of the appeal  
15 records. It's just, frankly, one document. It's the appeal  
16 denial letter that we're talking about, and they either refer  
17 to the guidelines as a basis for denial or they don't. And so  
18 it will be some burden on UBH to do that but, frankly, if  
19 there's a burden associated with it, UBH should have raised  
20 this earlier. They're clearly within the class definition.

21           **THE COURT:** Well, no, they shouldn't have raised it  
22 earlier. You agreed to the procedure so that's just -- and I  
23 also don't understand how what you just said isn't inconsistent  
24 with your due process argument. It's so easy to figure out  
25 exactly who these people are who were denied on an

1 administrative basis in the first instance and then -- this is  
2 those people -- right? -- denied administratively to begin with  
3 and then denied on a clinical ground on appeal. If it's so  
4 easy for them to find them, then there's an easy way to give  
5 notice. What do you mean?

6 **MR. ABELSON:** I see them as two different questions.  
7 There's the due process is sort of a baseline fairness issue  
8 and it's the best notice practicable. We have to meet that.  
9 We have met that.

10 **THE COURT:** No, but you haven't met that. That's the  
11 argument. The argument is if it's so easy to find these  
12 people, you should have found them because all you did as far  
13 as figuring out how to give these particular people -- you  
14 didn't do anything to try to figure out how to give these  
15 particular people notice. They were excluded because you  
16 didn't pay any attention to them because you didn't know they  
17 existed.

18 And then -- but you could have found them, apparently you  
19 say easily, and then you could just send them a notice.  
20 Instead, they have to rely by word of mouth and figure out that  
21 there's a website and call you.

22 So my question is: Why -- you know, if it's so easy, then  
23 it's a due process violation.

24 **MR. ABELSON:** I want to be clear, I don't -- I'm not  
25 saying it's easy. I think it's possible. In terms of

1 fairness, the people were aware of it. From their perspective,  
2 it would be unfair to kick them out of the class.

3 **THE COURT:** We're not talking about fairness. We're  
4 talking about the due process requirement in order to have  
5 somebody bound by a judgment --

6 **MR. ABELSON:** Right.

7 **THE COURT:** -- and the Rule 23 rules about an order to  
8 have somebody bound by a judgment, and the question is whether  
9 or not that has been met. And it strikes me that that's a --  
10 that is a challenge here because I actually think you're  
11 probably right, they could figure out who these people are.  
12 There would be some effort but not a crazy effort, and they  
13 could look at the appeal denial letters and match it up during  
14 the period in time to the class list and say, "Oh, we've got  
15 these extras."

16 But I'm not -- but I don't know. I just -- I don't -- you  
17 know, Ms. Romano says it's very complicated and difficult to  
18 do. You seem to think it's easy. I think that you're all  
19 arguing at cross-purposes at this point because if it's easy,  
20 there's a due process violation. If it's really difficult,  
21 there isn't. So I just don't know -- I'm not -- so I'm a  
22 little confused as to how you want to deal with this.

23 **MR. COWART:** Your Honor, if I could be heard on this.

24 I think the position we're trying to articulate in  
25 different ways is that let's -- for purposes of this

1 conversation, let's assume that these people have a great due  
2 process argument that they should not be bound, they didn't get  
3 notice.

4 I think the question in front of the Court really is what  
5 to do about that now. And the way I see it, the Court has two  
6 choices. Right now it could kick those people out of the  
7 class, sort of preemptively almost assume that those people  
8 because they didn't get notice, they don't want to be in the  
9 class and so they're out. Or the Court could leave them in the  
10 class, not decertify them, and we've made a record now for the  
11 last several hours about all the possible due process problems  
12 with the notice regime and the extent to which it got to them;  
13 and if they feel like their due process rights were violated  
14 and they have a problem with being bound, and we've also talked  
15 about the narrow sense in which they're going to be bound by  
16 anything here, but, nonetheless, if they felt like their due  
17 process rights were violated and they wanted to bring an  
18 action, they could do that. And to us, that's the natural  
19 forum in which they should assert the concerns that you  
20 articulate.

21 I think we take the point that, Your Honor, you are  
22 custodian to these class members. You are their fiduciary  
23 right now and we get the concern for the extent to which they  
24 did or didn't get notice and everything else we've been talking  
25 about; but to us, the answer here is to let them -- let sort of

1 the situation play out because if you kick them out of the  
2 class now, what is effectively happening, I think, is you are  
3 allowing UBH to narrow the scope of the class based on an  
4 argument about absent class members' due process rights, and  
5 that right -- just saying it that way, I think it points to at  
6 least the concerns we have about that approach; right?

7 UBH is saying, "Oh, the notice wasn't good enough. They  
8 didn't get the notice." The answer to that for us is, keep  
9 them in the class and they just have an argument, those  
10 individual people, down the line if they don't want -- if they  
11 want to contend they weren't bound, they've probably got a  
12 decent argument on that. But to do what Your Honor seems to be  
13 suggesting, i.e., kick them out of the class now, we think if  
14 we could do a poll, the vast majority of these people would  
15 say, "No way. This is all I've got."

16 **THE COURT:** Is it only their due process rights that  
17 are at stake?

18 **MR. COWART:** Well, there's the -- I think so. I mean,  
19 I can't --

20 **THE COURT:** I mean, the notice -- the best practicable  
21 notice, is that just about the due process rights of the  
22 prospective class members or is it about both sides' due  
23 process rights?

24 **MR. COWART:** I think it impacts UBH's due process  
25 rights only in the sense of preclusion. I think my colleague

1 Mr. Abelson is right about that, that the notice requirement  
2 flows from due process because --

3 **THE COURT:** That's my point.

4 **MR. COWART:** Yes. I think it's connected to the  
5 preclusion.

6 **THE COURT:** So that they are precluded, for example,  
7 from arguing something with respect to these people's claims.  
8 UBH is precluded from arguing, for example, that the guidelines  
9 are consistent with generally accepted medical practice,  
10 they're precluded, because I've ruled that way in this case and  
11 it's binding in something that anything affecting these  
12 whatever number of people this is.

13 So it has to do with both sides' due process rights. I  
14 mean --

15 **MR. COWART:** Yes.

16 **THE COURT:** And so that isn't -- while you're saying,  
17 great, that's -- well, does your remedy -- your remedy may work  
18 for the class members. Does it work for UBH? Can they argue  
19 in a subsequent lawsuit that they shouldn't be bound by this  
20 judgment because of the notice provision?

21 **MR. COWART:** No, that's exactly it. They can't argue  
22 that. What's their standing to argue that? They can't assert  
23 someone else's due process rights.

24 **THE COURT:** No, but that's my point, is their due  
25 process rights are at stake too.

1           **MR. COWART:** So let's stay with that then, you're  
2 right. So let's stay with their due process right. Their due  
3 process right was they have a right to a class certification  
4 proceeding. These people were included in the class -- in the  
5 definition of the class. UBH -- you know, any kind of reliance  
6 interest UBH has, the reliance interest is on the class  
7 certification order, and that order had them in the class. So  
8 they --

9           **THE COURT:** No, but, see, so your answer is that the  
10 notice provisions are only -- it's only one side's due process  
11 rights implicated by the notice.

12           **MR. COWART:** Well, it's both but only in the limited  
13 sense that I think I'm trying to agree with the Court that it  
14 becomes UBH's interest because of the preclusion connection on  
15 the plan member's side.

16           **THE COURT:** Okay. Do you want to add anything to  
17 this, Ms. Romano?

18           **MS. ROSS:** Your Honor, if I can just make one point.

19           **THE COURT:** Ms. Ross. I'm sorry.

20           **MS. ROSS:** Yes. Sorry, Your Honor. If I can just  
21 make one point on that last point Mr. Cowart was making with  
22 respect to the due process issues. And I think this goes back  
23 to what we talked about and we've really responded to most of  
24 what Mr. Abelson said in our earlier discussion on this, and I  
25 don't need to repeat what we said there.

1 But with respect to due process part of the purpose of  
2 giving the notice to class members is to protect the due  
3 process rights of both parties to allow for class members to  
4 make a decision about whether to bind themselves to the class  
5 and to the outcome of whatever the class claims may be before  
6 there are substantive rulings in the case. And now we're sort  
7 of talking about the people who never got that notice, and we  
8 disagree with Mr. Abelson's representation that the parties  
9 agree that that this was the best notice practicable as to this  
10 group of people.

11 **THE COURT:** Right.

12 **MS. ROSS:** We certainly agree to that as to the  
13 others.

14 But, you know, no effort was made by either party, and  
15 everyone agreed to the process to do this and maybe we could  
16 have found a way to do that if we had tried to do it, you know,  
17 four or five years ago, but to allow them now to sort of be in  
18 the class without having protected that right to opt out before  
19 Your Honor made substantive decisions in the case we think  
20 would be a violation of due process as to UBH.

21 **THE COURT:** Yeah. I mean, it's sort of like the same  
22 problem that you have with allowing opt-outs after substantive  
23 decisions are made. To allow someone to come in after  
24 substantive decisions have been made and make an election, I'm  
25 not going to raise the notice issue. I think I can't really.



1 I think I have to decide -- I don't think that remedy works.

2 The remedy is there of course, but I think that I have to  
3 make the decision now as to whether the best practicable notice  
4 was -- a reasonably practicable notice was -- or it's  
5 reasonably calculated to give -- the actual notice was given  
6 and not rely on something that might happen down the road,  
7 which effectively would give them, if they convince the judge  
8 of that, an option to opt out of a decision that they might not  
9 like where you say Ms. Romano could not, UBH could not.  
10 Ms. Ross is, I think, making that point. So I'm concerned  
11 about that.

12 All right. Well, I understand that issue.

13 Anything else you want to talk about?

14 **MS. REYNOLDS:** Your Honor, could you set a time frame  
15 for the additional --

16 **THE COURT:** Yes. Provisions?

17 **MS. REYNOLDS:** -- provisions that you would like? And  
18 if we may request that it be as brief as possible.

19 **THE COURT:** Yes. Yes. It's going to be short.

20 So you've each promised me things in terms of additional  
21 suggested language. Two weeks from today. No briefing. Just  
22 language.

23 **MS. REYNOLDS:** A joint filing?

24 **THE COURT:** No, no. You're going to suggest  
25 something. They're going to suggest something. Hopefully

1 you'll meet and confer with each other on it before it comes  
2 in, but just suggest some language and then I'll make a  
3 decision on it.

4 **MS. REYNOLDS:** All right.

5 **THE COURT:** Okay. What else?

6 **MS. REYNOLDS:** Your Honor, have you -- do you intend  
7 to set a schedule for submission of names for a special master?  
8 Is that something that will be in your order or would you like  
9 to get that started sooner?

10 **THE COURT:** So here's what I'm -- I mean, ultimately  
11 what I'm going to do is I'm going to have a special master and  
12 I'm going to ask you-all to meet and confer and draft an order  
13 to appoint the special master, which will include how the  
14 person gets appointed and all of the things that are required  
15 by Rule 56 or whatever it is.

16 And, you know, there's some of it that you won't agree on,  
17 like the scope of some of the responsibilities, but I'm hoping  
18 that you can agree on most things so that I can do that, but  
19 that special master appointment will be part of it.

20 And if you want to start, you're welcome to start meeting  
21 and conferring because I am going to have the parties address,  
22 you know, the standard of review and all the 53(b) matters and  
23 53(g) matters and all the, you know, timetables for reports,  
24 et cetera, et cetera, and that kind of thing. So I think you  
25 should meet and confer and start that because it's certainly

1 going to be in the remedies order that I'm going to appoint one  
2 and ask the parties to prepare that.

3 And the other -- yeah. I don't know what that's going to  
4 be. One second.

5 (Pause in proceedings.)

6 **THE COURT:** Okay. All right. Great.

7 **MS. ROMANO:** Your Honor, just to follow-up. Just in  
8 light of the discussions on the various remedies and what that  
9 order is likely to look like today, UBH does intend to seek a  
10 stay pending appeal and would request a provisional stay so  
11 that it will be able to get in a motion to stay, have it  
12 decided by this court or the Ninth Circuit if necessary.

13 **THE COURT:** You're welcome to make the motion. I will  
14 not be staying my order at all in its initial phase. You can  
15 make -- you have to make a motion in front of me to stay it of  
16 course so you can get to the Ninth Circuit, and I invite you to  
17 do that; but my current intention is not to have any stay  
18 unless I'm convinced otherwise. So I wouldn't put in a  
19 provisional stay. You know, you may convince the Ninth Circuit  
20 otherwise. That's all well and good, and I assume this is  
21 bound for the Circuit no matter what, but I have no intention  
22 of issuing a stay with respect to this matter at this point in  
23 the case. You know, maybe you'll convince me once you file the  
24 motion, but at this point in the case I'm not going to do it.

25 Okay. Thank you-all.

1           **MS. REYNOLDS:** Thank you, Your Honor.

2           **MS. ROMANO:** Thank you, Your Honor.

3           **MS. ROSS:** Thank you.

4           **THE COURT:** Thanks.

5           **MR. COWART:** Thank you, Your Honor.

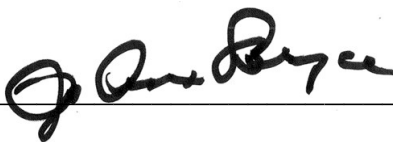
6                   (Proceedings adjourned at 2:57 p.m.)

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10                           **CERTIFICATE OF REPORTER**

11                   I certify that the foregoing is a correct transcript  
12           from the record of proceedings in the above-entitled matter.

13  
14           DATE:     Sunday, September 6, 2020

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20                   Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
21                           U.S. Court Reporter  
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